

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

DELTA ETA CORPORATION	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-04-580
	)	
UNIVERSITY OF DELAWARE	)	
	)	
Defendant.	)	

Submitted: September 20, 2007  
Decided: December 27, 2007

**Plaintiff's Motion for Summary Judgment  
Defendant's Motion to Amend Answer**

OPINION AND ORDER

Amy E. Evans, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

William E. Manning, Wilmington, Delaware, Attorney for Defendant.

BRADY, J.

## INTRODUCTION

This is a breach of contract action filed by Plaintiff, Delta Eta Corporation (“Delta”), against Defendant, the University of Delaware (“UD”) on April 24, 2007. UD answered the Complaint on May 18, 2007. On July 5, 2007 Delta moved for summary judgment on four of the five counts in the Complaint. UD filed a Response in Opposition to Summary Judgment on July 5, 2007. On that same date, Delta filed a Motion to Amend its Answer. The Court heard both motions on August 9, 2007. At the hearing’s conclusion, the Court requested additional submissions from the parties, and the Court received the parties’ final submissions on September 20, 2007.

After careful consideration of the parties’ arguments and for the reasons that follow, UD’s Motion to Amend is hereby GRANTED. The Court DENIES in part Delta’s Motion for Summary Judgment and reserves decision on the remainder of the Motion in order to permit Delta to file an amended motion.

## FACTS

On May 25, 1978 Delta and UD entered into a lease agreement (“Original Lease”) whereby Delta leased from UD a parcel of land for a

period of ninety-nine years. As part of the Original Lease, Delta was to erect a building (“Chapter House”) to house a chapter of Pi Kappa Tau, a national fraternity. Pi Kappa Tau occupied the Chapter House until 1998, when the fraternity was ejected from campus due to misbehavior.

After the fraternity was ejected, the parties entered into a new contract (“Sublease”) on July 1, 1998. Pursuant to the Sublease, UD leased the Chapter House from Delta for a three-year term with the option of renewing the lease on an annual basis for every year the fraternity was not able to return to the Chapter House.<sup>1</sup>

### *Chapter House Renovations*

UD leased the Chapter House with the intent of using it as a student dormitory. Before UD could use the Chapter House for this purpose, the university needed to renovate the building to comply with UD’s occupancy standards. UD was to pay for the renovations. However, if the total cost of the renovations exceeded UD’s total revenue from the property over the term of the Sublease, Delta was responsible for reimbursing UD for the net loss.

The pertinent sections of the Sublease read as follows:

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<sup>1</sup> The Sublease also included an adjacent parking lot that Delta leased from UD in 1989. The parking lot lease and parking lot sublease are not immediately relevant to the issues *sub judice*.

- (1) Condition: Fraternity acknowledges and agrees that the current condition of the property does not comply with University's standard for occupancy as a dormitory by its students, and that the Property must therefore be repaired and improved in order for University to enter and perform this Sublease. University shall have the right to make, and Fraternity shall permit and cooperate in, any or all such repairs and/or improvements as are indicated on the Schedule of Repairs attached to this sublease...The cost of such Work shall be advanced by the University; however, the unrecovered balance of the cost of such Work shall be owed, due and payable by Fraternity to University at the end of the Term, as more particularly provided in Section 9.
- (9) Reimbursement: Fraternity acknowledges that the University's revenue from utilizing the Property for dormitory purposes are unlikely to cover the University's costs of bringing the Property up to its standard for dormitory use, paying the rent, and meeting its other obligations under this Sublease. Accordingly, to induce the University to repair the Property, enter into and perform this Sublease, Fraternity hereby agrees that, if the total cost to University of repairing, Subleasing, making use of the Property, paying rent...and otherwise performing this sublease exceeds the University's total revenues therefrom, the amount of such excess cost shall be reimbursed to University within 90 days after the University has provided Fraternity with an accounting of such costs and revenues.

After entering into the Sublease, UD made the necessary improvements to the Chapter House and eventually began using it as a dormitory. From 2001 to 2005, UD exercised its annual option of extending the Sublease for one year. According to financial documents submitted to the Court by UD, the Chapter House operated at a net loss over the first

several years that it was used as student housing. However, by the close of fiscal year 2005, the Chapter House had net surplus revenue of \$26,498.

### *Original Lease Termination and Leasehold Reimbursement*

Both the Original Lease and the Sublease contained provisions that permitted UD to terminate the Original Lease in the event that Delta was no longer able to use the Chapter House to house the fraternity. The Sublease contained a Reimbursement Schedule that outlined a procedure for terminating the Original Lease and reimbursing Delta for the remainder of its leasehold interest.<sup>2</sup> The relevant portions of the Reimbursement Schedule set forth the following:

In the event that the University terminates the Fraternity's lease with the University prior to the expiration of the term specified in the Agreement of Lease dated 25 May, 1978... the University will pay, and the Fraternity shall accept, as full reimbursement for the early transfer of title to and possession of the Chapter House from Fraternity to the University, an amount (the "Reimbursement") calculated as follows:

(a) A local FDIC insured institutional lender... selected by Fraternity and approved and engaged by University (which approval will not arbitrarily be withheld) will appraise or obtain an appraisal of the net fair market value of the leasehold rights which the Fraternity would

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<sup>2</sup> The Original Lease also contained reimbursement provisions, but the Sublease's Reimbursement Schedule permanently amended the reimbursement provisions contained in the Original Lease.

have had... if the Ground Lease had not been terminated (the "Remaining Leasehold").... The appraisal will be made or obtained on the same basis that Lender would use in order to make a bona fide loan to the Fraternity secured by such remaining leasehold interest, in compliance with all banking and lending regulations applicable to such appraisal and loan.

The Reimbursement Schedule further provides that once the appraised value is ascertained, the parties are to subtract from it any payments that Delta owes to UD under the terms of the Original Lease and Sublease. UD is then required to tender final payment within 90 days of receiving notice of the total amount due. The Reimbursement Schedule does not include any provisions that permitted the parties to challenge the appraisal or obtain a second appraisal.

On August 5, 2005 UD notified Delta that it was exercising its option to terminate the Original Lease effective June 30, 2006. Pursuant to the Reimbursement Schedule, Delta retained A.R. Hughes & Company ("Hughes") to appraise Delta's leasehold interest. Though the factual record is silent on this fact, UD presumably acquiesced to the selection of Hughes, as the appraiser was subject to UD's approval. Hughes completed the appraisal on June 7, 2006, concluding that Delta's remaining leasehold interest had a value of \$800,000. Page 5 of the appraisal states that it is

“assumed that there are no hidden or unapparent conditions of the property, subsoil or structures that render it more or less valuable.”

After subtracting from the appraisal the total amount owed to UD under the terms of the parties’ existing agreements, Delta notified UD on August 31, 2006 that UD owed \$768,500. Per the 90-day term in the Reimbursement Schedule, UD was required to tender this amount by November 29, 2006.

*Delta Demands Reimbursement for Additional Items*

In addition to demanding the \$768,500 that Delta determined it was owed under the Reimbursement Schedule, Delta demanded payment for other sums to which Delta claimed it was entitled under the terms of the Sublease. Delta claimed it was owed the \$24,498 in profit that UD received from operating the Chapter House as a dormitory and \$25,527 in renovation costs that were not authorized by the Sublease’s Schedule of Repairs. The \$25,527 in improvements was from a bike rack installed by UD and a “PDI Door Access System.”

UD denied responsibility for Delta’s additional claims and refused to pay Delta the \$768,500 unless and until Delta agreed to execute a release of the claims. Delta maintained that it was owed the additional amounts and

refused to release its claim thereto. Accordingly, UD refused to pay the \$768,500 and Delta filed the instant action on April 24, 2007.

Delta's five-count complaint prays for damages of no less than \$870,525 attributed to the following sums allegedly owed by UD: \$768,500 payment due under the Reimbursement Schedule (Count I); the fair market rental value of the Chapter House from June 2006 onward, until such time UD pays the outstanding amounts due under the Sublease (Count II); \$24,498 in profits that UD received from its Chapter-House operations in fiscal year 2005-2006 as well as any profit earned in fiscal year 2006-2007 (Count III); \$18,851 from the PDI Door Access System; and \$6,676 from the bike rack.

Count I of Delta's complaint sets forth, in pertinent part, the following:

12. On August 31, 2006, the appraiser indicated a leasehold value of \$800,000. In accordance with the Reimbursement Schedule, one half of the cost of the appraisal, plus any sums Delta Eta owed University were subtracted from the \$800,000 figure.
13. As a result, the total amount University owes Delta Eta is \$768,500.

UD answered Delta's complaint on May 18, 2007. In response to Count I, UD answered as follows:

12. Admitted.



13. Admitted that \$768,500 is the total amount that the University is obligated to pay Delta Eta. Denied that this amount is yet “owed” to Delta Eta because it continues to press the other claims set forth in this complaint. By way of further response, the University has offered to pay \$768,500 in exchange for a full release of all claims by Delta Eta. Delta Eta has been unwilling to execute such a release.

*Delta Moves for Summary Judgment and UD Moves to Amend its Answer*

Delta filed the instant Motion for Summary Judgment on July 5, 2007. UD’s response was filed on July 23, 2007. On this same date, UD filed a Motion to Amend its Answer. The Motion claims that since filing its original Answer, UD has learned that the Chapter House is infested with mold and the infestation renders the building virtually worthless. UD’s amended answer, if granted leave to amend, would read as follows:

12. Admitted that the appraiser indicated a leasehold value of \$800,000 on August 31, 2006. Denied that this appraisal accurately reflects the leasehold value. By way of further answer, the appraisal expressly assumes the absence of “hidden or unapparent conditions of the property... that render it more or less valuable.” In light of the University’s recent discovery of mold infestation rendering the building worthless, or nearly so, the University is entitled to a reappraisal.
13. Admitted that \$768,500 is the total amount that Delta Eta has demanded from the University based on the 2006 appraisal. Denied that this amount is “owed” to Delta Eta in the absence of a release of all other claims including those set forth in Counts II – IV of the

Complaint. It is further denied that \$768,500 accurately reflects the value of the structure and that a revised appraisal, to which the University is entitled, would so conclude.

The Court heard both motions on August 9, 2007. At the hearing's conclusion, the Court requested additional submissions from the parties. Specifically, the Court requested defendant to submit any documents evidencing the time at which UD became aware of the alleged mold infestation. UD filed its additional submissions on September 10, 2007 and Delta filed its additional submissions on September 20, 2007. The Court has reviewed these submissions along with the parties' other moving papers, and the relevant timeline is as follows:

- **June 2006:** Hughes conducted the appraisal.
- **August 31, 2006:** UD received the appraised value of the property.
- **October 2006:** UD received a complaint from a student about a possible allergic reaction to mold in the Chapter House.
- **November 29, 2006:** The amount under the reimbursement schedule became due (90 days from Aug. 31).
- **November-December 2006:** UD conducted a preliminary investigation into the mold complaint.
- **February 2007:** UD relocated students from the lower floor of the Chapter House and sealed the lower floor from the rest of the building in an attempt to isolate the mold infestation.
- **March 2007:** UD commissioned ABHA (an architectural firm) to conduct a feasibility study of possible future use of the Chapter House as either a dormitory or as office space.
- **April 24, 2007:** Delta filed the instant action.
- **May 18, 2007:** UD answered the complaint.

- **June 26, 2007:** ABHA issued a draft report of the feasibility study. Due to the report, UD concluded that it was not cost effective to utilize the Chapter House as either dormitory housing or office space.
- **July 5, 2007:** Delta filed its Motion for Summary Judgment.
- **July 23, 2007:** UD filed a Motion to Amend its Answer and a Response in Opposition to Plaintiff's Motion for Summary Judgment.

## DISCUSSION

Since Delta filed its Motion for Summary Judgment prior to UD's Motion to Amend, Delta's motion obviously does not account for the facts and argument contained in UD's amended answer.<sup>3</sup> Since the amended answer – if granted – will affect the Court's analysis of the issues relevant to consideration of summary judgment, the Court first turns to UD's Motion to Amend.

### Defendant's Motion to Amend Answer

After considering the parties' arguments, the applicable law and the specific facts and circumstances surrounding this case, the Court is satisfied that UD's Motion to Amend should be granted. Amending the motion at this stage of the proceeding is not unduly prejudicial to Delta, and the Court does not find that the motion was made in bad faith. Further, although there

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<sup>3</sup> The Court notes that Delta's Reply Brief does briefly address this issue.

may be some merit in Delta's argument that the amendment is futile, the Court finds that the parties have not yet had the opportunity to fully and fairly argue the legal impact of the proposed amendment.

### *Legal Standards*

A motion to amend a party's pleading is controlled by Rule 15(a) of the Superior Court Civil Rules, which, in pertinent part, states as follows:

- (a) *Amendments.* A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Generally speaking, the Court favors a liberal application of Rule 15(a) in order to “encourage the disposition of litigation on its merits.”<sup>4</sup> However, despite the policy interest behind permitting amendments, “that permission is not automatic.”<sup>5</sup> In exercising the Court's discretion under Rule 15(a), “the Court considers certain factors, which include bad faith,

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<sup>4</sup> *Legatski v. Bethany Forest Assoc., Inc.*, 2005 WL 2249598 (Del. Super. 2005) (quoting *E.K. Geysler Co. v. Blue Rock Shopping Ctr., Inc.* 229 A.2d 499 (Del. Super. 1967).

<sup>5</sup> *Kraus v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889 at \*6 (Del. Super. 2004).

undue delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of amendment.”<sup>6</sup>

*Contentions of the Parties*

UD contends that it learned of the specific facts necessitating the amendment after it filed its original answer. UD alleges that it was aware of a mold problem prior to filing its original answer, but it did not appreciate the severity of the problem until receiving the report from ABHA. UD argues that since this case is still in the early stages of litigation, Delta will suffer no prejudice if leave to amend is granted.

Delta opposes the motion on the grounds that it is futile, prejudicial, and made in bad faith. Delta contends that UD knew of the mold problem before filing its answer, and that its timing to amend its answer at this juncture is purely tactical. Delta also argues that the amendment is futile, because the contract does not contain any provisions for granting a reappraisal of the property.

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<sup>6</sup> *Fields v. Kent County*, 2006 WL 345014 at \*4 (Del. Ch. 2006).

### *Analysis*

At the outset, the Court notes that this suit was commenced on April 24, 2007 and UD filed its original answer on May 18, 2007. Pursuant to Rule 15(a), UD was permitted to amend its answer “as a matter of course” as late as June 7, 2007. It filed the instant Motion to Amend on July 23, 2007, approximately a month and a half after it was permitted to amend without leave of the Court. Under such circumstances, the Court cannot conclude that undue delay, dilatory motive or repeated failures to amend are an issue in this motion. Therefore, the Court turns to the issues of undue prejudice, bad faith and futility.

### **Undue Prejudice**

In its written submissions to the Court, Delta argues that permitting the amended complaint would be unduly prejudicial. However, Delta does not explain specifically how it is prejudiced by the amended answer, and the Court cannot find that Delta will be prejudiced in any manner that cannot be cured.

When UD initially filed its Motion to Amend, this case was in the relatively early stages of litigation. Although the motion was filed after Delta’s Motion for Summary Judgment, it was filed prior to any hearing or

decision on that motion. Once Delta became aware of UD's Motion to Amend, it was free to withdraw its summary judgment motion and await a decision on the request to amend. Delta also had the option of consenting to the Motion to Amend and then amending its Motion for Summary Judgment accordingly.

As litigation proceeds, the parties' positions may change as the factual record becomes more complete. It is this exact contingency for which Rule 15(a) exists. Although it is to Delta's advantage to hold UD to its original answer, it is not necessarily prejudiced simply because this position has changed. Although the change occurred after Delta moved for summary judgment, Delta's Motion for Summary Judgment was itself filed at a relatively early stage in the case.

Additionally, although denying the amendment may preclude UD from challenging the sum due for the leasehold interest, granting it does not decide UD is entitled another appraisal, is not responsible for causing the mold during its use of the property, or is otherwise entitled to all the relief it requests. Those are all issues of law and fact to be decided during the progress of this case. Therefore, the Court does not find that permitting the amended answer is unduly prejudicial to Delta.

## **Bad Faith**

When there is evidence that a party is aware of a fact but failed to include it in a pleading, the exclusion from the pleading can create the inference that the party “was engaging in tactical maneuvers.”<sup>7</sup> Therefore, in a defendant’s motion to amend its answer, a plaintiff can defeat the motion by demonstrating that “the defendant knew or should have known the answer was erroneous at the time it answered the complaint.”<sup>8</sup>

Delta contends that UD was aware of the alleged mold infestation when it filed its answer but failed to include this fact in its answer. Delta submits that the timing of UD’s motion “suggests that it is purely a tactical move.”<sup>9</sup>

UD argues that it knew of the mold problem generally, but did not include it in its original answer because it did not appreciate the full extent of the problem until it received the report from ABHA. UD alleges that the report demonstrates that the cost of abating the mold infestation exceeds the building’s appraised value. UD submits that although “it knew that mold existed in the building, it would have been a bit reckless to assert, without

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<sup>7</sup> Krauss at \*6.

<sup>8</sup> *Id.* at \*7.

<sup>9</sup> Pl. Resp. Br. at 3.



more, that the appraisal over-valued the property.”<sup>10</sup> UD argues that it moved to amend its answer within a reasonable time after learning of the extent of the mold problem.

The Court accepts UD’s explanation for failing to include the mold-infestation issue in its original answer. The report was submitted to UD after it filed its answer, and UD submits that the contents of the report materially altered its original position. Therefore, the Court does not find that the Motion to Amend was made in bad faith.

### **Futility**

“When a proposed amendment... is not legally viable, the Court may deny a motion to amend even if the other predicates of Rule 15 are satisfied.”<sup>11</sup>

UD’s amended answer alleges that the Chapter House’s appraised value is not accurate because neither party nor the appraiser knew of the soon-to-be-discovered mold infestation at the time of the appraisal. UD states that the appraisal assumed that “there are no hidden or unapparent conditions of the property, subsoil or structures that render it more or less

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<sup>10</sup> Def. Sept. 10 2007 Br. at 3.

<sup>11</sup> *Dickens v. Costello*, 2002 WL 1463106 at fn. 9 (Del. Super. 2002); *Fields* at \*4.

valuable.”<sup>12</sup> UD argues that the newly discovered facts render this assumption false, and it should be allowed to amend its answer accordingly.

Delta submits that even if the appraisal is no longer accurate, UD is still liable for \$768,500 because the Reimbursement Schedule does not contain any provisions for another appraisal. In essence, Delta argues that the subsequent discovery of a pervasive mold problem is irrelevant under the terms of the parties’ contract.

Although the contract does not explicitly permit the parties to challenge the property’s appraised value, the Court cannot at this juncture conclude that the alleged mold infestation has no relevance to the proceeding. There are numerous legal issues to which the alleged mold infestation may bear some relevance.<sup>13</sup> In order to determine that the proposed amendment is futile, the Court would need to analyze all possible bars to recovery created by the amendment, and the Court would need to engage in this analysis on a factual record that is at its inception. Moreover, since Delta based its Motion for Summary Judgment upon UD’s original answer, neither party has had the opportunity to fully brief the Court on this

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<sup>12</sup> Def. Am. Ans. at 2.

<sup>13</sup> Walter G. Wright, Jr. and Stephanie M. Irby, *The Transactional Challenges Posed by Mold: Risk Management and Allocation Issues*, 56 Ark. L. Rev. 295 (2003) (Discussing mold-related litigation and the various legal issues posed by mold in the property-transaction context.)

issue. Given the present status of the factual record, the Court cannot conclude that the proposed amendment is invalid on its face.

### Plaintiff's Motion for Summary Judgment

Delta's complaint sets forth five Counts against UD. Delta has requested summary judgment on four of those five Counts (Counts I, III, IV and V).

As to Count I, Delta claims that it is entitled to the \$768,500 sum allegedly owed by UD pursuant to the Sublease Reimbursement Schedule. As discussed above, the Reimbursement Schedule required the parties to obtain an appraisal of Delta's leasehold interest in the property. Since the Court has granted UD's Motion to Amend, UD is now challenging the legitimacy of this appraisal. Delta's Motion obviously does not address UD's new position on the property's appraised value, so the Court must defer decision on summary judgment with respect to Count I. Delta, in its discretion, may amend its Summary Judgment Motion accordingly.

The substantive claims in Counts III, IV and V are not affected by UD's allegation of a pervasive mold problem, so the Court will address the parties' positions with respect to these claims. For the reasons that follow,

UD's Motion for Summary Judgment is DENIED with respect to Counts III, IV, and V.

### *Standard of Review*

The standard for granting summary judgment is high.<sup>14</sup> Summary judgment may be granted where the record shows 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.<sup>15</sup> “In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party.”<sup>16</sup> “When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.”<sup>17</sup> “Nor will summary judgment be granted if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstance.”<sup>18</sup>

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<sup>14</sup> *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

<sup>15</sup> Super. Ct. Civ. R. 56(c).

<sup>16</sup> *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).

<sup>17</sup> *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

<sup>18</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

### *The Parties' Contentions*

As to Count III, Delta claims that it is entitled to the profits that UD earned from operating the Chapter House as a student dormitory. Delta bases this claim on the fact that Delta was required to reimburse UD for the costs associated with the repairs and improvements needed to make the Chapter House suitable for student housing. Based on this provision, Delta claims that the parties understood that “if the University’s revenue from using the Property exceeded the cost of bringing the Property up to standards for occupancy, then the profit (or surplus) would go to Delta Eta.”<sup>19</sup>

UD contends that no such agreement existed. UD argues that the contract’s plain language does not give Delta a right to any profits earned by UD. UD claims that “such a provision would have been inconsistent with the goal of inducing the University to enter the sublease.”<sup>20</sup>

As to Counts IV and V, Delta claims that UD “charged”<sup>21</sup> Delta for improvements that were not necessary to making the Chapter House suitable for dormitory housing. Delta’s position is somewhat contradictory in regard to these two related claims. In its Complaint and Motion for Summary

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<sup>19</sup> Pl.’s Mot. Attach. Aff. at ¶ 5.

<sup>20</sup> Def.’s Resp. Br. at 9.

<sup>21</sup> Pl.’s Comp. at 5-6; Pl.’s Mot. for Summ. J. at 3.

Judgment, Delta submits that it was “charged”<sup>22</sup> these amounts. In its Reply Brief, Delta suggests that Counts IV and V are a derivative of Count III. In essence, since Delta claims that it is entitled to profits earned from the Chapter House, it argues that it should be reimbursed for any unauthorized costs, which, by definition, would decrease profits.

Delta’s change in its original position may be a response to UD’s assertion that Delta never actually paid any money to UD, and UD cannot reimburse Delta for money that UD never received. UD admits that these amounts were indeed accounted for as operating expenses for the Chapter House and, therefore, credited against the profits, but UD claims it was authorized to make the disputed expenditures under the Schedule of Repairs.

To reconcile the inconsistency in Delta’s positions, the Court will treat Counts IV and V as derivatives of Count III. Such an approach is consistent with the current positions of both parties. Simply put, Delta claims that it is entitled to the profits earned from the Chapter House, and UD claims that the contract confers no such right upon Delta. If Delta is not

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<sup>22</sup> *Id.*

entitled to the profits, then it obviously would have no right to question the Chapter House operating expenses.<sup>23</sup>

*Analysis and Conclusion Regarding Summary Judgment on Counts III, IV and V*

After careful consideration of the parties' positions the Court must deny summary judgment with respect to Count III. Since Counts IV and V are derivatives of Count III, the Court denies summary judgment with respect to these two counts as well.

“It is an elementary canon of construction that the intent of the parties must be ascertained from the language of the contract. Only when there are ambiguities may a court look to collateral circumstances.”<sup>24</sup> Further, the Court should not “distort or twist contract language under the guise of construing it.”<sup>25</sup>

Paragraph 9 of the Sublease states that “if the total cost to University of... performing this sublease exceeds the University’s total revenues therefrom, the amount of such excess cost shall be reimbursed” by Delta.

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<sup>23</sup> Had the Chapter House operated at a net loss, then Delta would have had the right to challenge its obligation to reimburse UD for allegedly unauthorized expenses, but the uncontroverted facts demonstrate that UD received a profit from the Chapter House.

<sup>24</sup> *Citadel Holding Corp. v. Roven*, 603 A.2d 818,822 (Del. 1992) (citations omitted).

<sup>25</sup> *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

Delta argues that this clause entitles it to the profits that UD earned from the Chapter House. The evidence upon which Delta relies to support this assertion is an affidavit from Clark Lord, a certified public accountant and Delta's treasurer. According to the affidavit, "the parties agreed that if the revenues the University received from utilizing the chapter house exceed the expenses then any profit went to Delta Eta."<sup>26</sup>

UD has submitted an affidavit which directly refutes the allegations contained in Delta's affidavit. According to UD's affidavit, "it was never the case that Delta Eta would be entitled to surplus Dormitory revenues... Such a provision would have been inconsistent with the goal of inducing the University to enter the Sublease."<sup>27</sup>

While the Court does not have sufficient facts to determine if such parol evidence is admissible in this matter, assuming, *arguendo*, that the affidavits are admissible, they create a genuine issue of material fact with respect to the issue of the parties' intent. Accordingly, Delta's Motion for Summary Judgment must be DENIED with respect to Count III. As Counts IV and V are predicated upon the argument in Count III, summary judgment must be DENIED with respect to these two claims as well.

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<sup>26</sup> Pl.'s Summ. J. Mot. Attach. Aff.

<sup>27</sup> Def. Resp. Att. Aff. at ¶ 6.



CONCLUSION

For the forgoing reasons, UD's Motion to Amend its Answer is GRANTED. The Court reserves decision on the portion of Delta's Motion for Summary Judgment that addresses Count I of the Complaint. Delta may file an amended motion that addresses the position taken by UD in its Amended Answer. The portion of Delta's Motion for Summary Judgment that addresses Counts III, IV and V of the Complaint is DENIED.

**IT IS SO ORDERED.**

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/s/

*M. Jane Brady*

*Superior Court Judge*