STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * *

601 S. BEACON PLACE, LLC, a Michigan Limited Liability Company; and **Dr. RODNEY L. KILPATRICK,** an individual;

Plaintiffs/Counter-Defendants,

v

PAUL CREASON, DDS,

Defendant/Counter-Plaintiff.
____________________________________/

OPINION AND ORDER PARTIALLY GRANTING AND PARTIALLY DENYING SUMMARY DISPOSITION

File No. 20-6298-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan
on the 3rd day of December, 2021
PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Motions Before the Court

The parties have again brought competing motions for partial summary disposition. Plaintiff/Counter-Defendant 601 S. Beacon Place LLC (601 S. Beacon) brings a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendant/counter-plaintiff Paul Creason, DDS (Dr. Creason) brings a motion for partial summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) and MCL 600.5807(9).

601 S. Beacon's Motion

601 S. Beacon asks that the Court find that there is no genuine material dispute as to each of the following questions of fact:

> 1. With the exception of the rental rate, all provisions of the original lease continued in effect and remain enforceable for the duration of Dr. Creason's month-to-month tenancy.
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> 2. From September 2008 until Dr. Creason's vacation of the leased premises, Dr. Creason's rent was no less than $2,390 per month.
>
> 3. Dr. Creason is liable for nine months unpaid rent between 2020 and 2021.
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> 4. Dr. Creason did not provide 601 S. Beacon with notice of any roof leak at the leased premises until October 2020.

In his brief in response to 601 S. Beacon's motion, Dr. Creason asserts that summary disposition should be granted in Dr. Creason's favor as to each of these four questions pursuant to MCR 2.116(I)(2). The court will address each of these questions in turn.

As to question 1, with discovery completed, the court concludes that 601 S. Beacon's motion for summary disposition should be partially granted. Plaintiff correctly notes that a lease is a contract and ordinary rules of contract interpretation apply. *Sprik v Univ of Mich Bd of Regents*, 43 Mich App 178, 193; 204 NW2d 62 (1972). The primary goal of contract interpretation is to honor the parties' intent. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The unambiguous language of a contract reflects the parties' intent, so the Court interprets the contract as written. *Coates v Bastian Brothers*, Inc, 276 Mich App 498, 503; 741 NW2d 539 (2007).

The parties' Lease of March 21, 1996 provided in section 20, in relevant part, as follows:

> 20. <u>Delivery of Possession of Holding Over at End of Term</u>. … In the event Lessee remains in possession after expiration of the term, or any renewal term of this Lease, Lessee shall be a tenant from month to month only, at twice the base rental rate but otherwise on the same conditions, except as to term, as provided in this letter.

It is not disputed that Dr. Creason "held over" after the end of the original term of the Lease, and no option for a renewal term was ever exercised under the terms of the Lease. There is also no dispute that Dr. Creason did not pay "twice the base rental rate" after holding over when the Lease expired on April 30, 1999. However, there is also no dispute that plaintiff accepted defendant's continuing monthly rental payments from May 1999 until September 2008, when the parties entered into a written modification of the monthly rental terms. Although the "twice the base rental rate" language of section 20 continued in force after the expiration of the original term of the Lease, there is no evidence that plaintiff took any action to enforce it.

In addition to section 20, sections 24 and 25 of the Lease show that the parties intended that the terms of the Lease would continue after the expiration of the initial term. Section 24 provided that the invalidity or unenforceability of any term or provision of the Lease would not affect the validity or enforceability of any other term of the Lease. Section 25 provided specifically:

> 25. Covenants and Conditions. Each term, agreement, obligation, and provision of this Lease to be performed by Lessee shall be construed to be both a covenant and a condition, *all of which shall survive the expiration or termination of this Lease*, if any renewal or extension of this Lease and of Lessee's right to possession is made." (emphasis added).[1]

However, the parties' subsequent agreements modifying the rent (in 2008, 2013, and 2016) had consequences for certain terms of the Lease. First, the third paragraph of section 3 of the Lease, providing for optional renewal terms and percentage rental increases, have no further force or effect.

Second, the rental amounts referenced in Exhibit B (attached to section 4 of the Lease) have no further force or effect, although the other terms of section 4 (when rent is due each month, where it is due, and late charges and service charges) remain effective (subject to the statute of limitations, below).

Third, the "twice the base rental rate" term of section 20 of the Lease is no longer in force as it was not renewed by the parties when the rental amount was modified, and the continuation of a month-to-month tenancy by definition eliminated the expiration date (or any "renewal" date) in the Lease.

[1] It might be argued that the "if" language in the last clause of this paragraph renders this paragraph applicable *only* if the lease extension option provided for in Section 3 of the Lease is exercised. The court would disagree, as the option language in section 3 applies only to lease "renewals", while the use of the terms "renewal or extension" in section 25 suggests that the Lease may be extended by the lessee's holdover possession even if no renewal takes place.

Fourth, the conversion of a specific term to a month-to-month tenancy modified the requirement of section 27 of the Lease, which provided that the Lease "may not be amended, waived or discharged, except [*sic*: by] any instrument in writing executed by the party against which enforcement of such amendment, waiver or discharge is sought…." The parties agree that they entered into an agreement to modify the lease in 2008. Subsequently, they modified the rental amount again in 2013 and in 2016. These modifications are binding and enforceable, despite the presence of the anti-waiver and written modification clause in the original Lease. *Quality Prods & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 372–373; 666 NW2d 251 (2003); see also *Kelly–Stehney & Assoc, Inc. v MacDonald's Indus Prods, Inc. (On Remand),* 265 Mich App 106, 119–121; 693 NW2d 394 (2005) (modification was enforceable, despite a contractual provision requiring modifications to be in writing, because clear and convincing evidence existed that the parties modified their prior written contract; one party testified that the parties verbally agreed to the modification, and second party accepted checks reflecting the modification without objection).

With those clarifications as to the effect of the rental modification agreements, plaintiff is entitled to partial summary disposition as to question 1, as *most* of the provisions of the original lease continued in effect, and remain enforceable, for the duration of Dr. Creason's month-to-month tenancy.

In September 2008, the parties entered into an agreement to change the monthly rent to $2,390.00 per month. This continued until August 2013, when the parties again changed the monthly rental amount to $2,440.00 per month. The email from Dr. Kilpatrick to Dr. Creason sent February 16, 2016 states that the rent shall be $1,750.00 per month "for now."[2] As there is no evidence supporting any other specific time frame, the most reasonable interpretation of the phrase "for now" is that the monthly rent payment shall remain $1,750.00 indefinitely unless and until the parties agreed to change this amount. The evidence further establishes that Dr. Creason paid rent in the amount of $1,750.00 per month and that Dr. Kilpatrick accepted these payments without

[2] Dr. Kilpatrick's email states, in pertinent part: "Consider this: I will reduce your monthly rent to $1750, as of the first of February for now (I haven't received any payment yet this month from you)." See Exhibit B to the affidavit of Dr. Rodney L. Kilpatrick. While plaintiff would have been unable to enforce a retroactive *increase* in rent (see discussion below), defendant would be presumed not to have objected to a retroactive *decrease* in rent.

objection. Dr. Kilpatrick's email of February 16, 2016 amounted to an offer which Dr. Creason accepted by execution of checks in payment of the monthly rent. This terminated – at least temporarily – the dispute between the parties regarding the amount of the rent payment. As to question 2, the Court finds that there is no genuine dispute of material fact that the amount of the rent for some period of time from and after February 2016 was $1,750.00 per month.

However, after the lease modification in February 2016 setting monthly rent at $1,750.00, 601 S. Beacon gave notice of further rent increases, as follows:

> December 11, 2016: Plaintiff's letter gave notice of a rent increase to $1,850.00 per month, effective January 1, 2017 (Plaintiff's Exhibit 7 to Plaintiff's Second Motion for Summary Disposition).
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> December 18, 2017: Plaintiff's letter gave notice of a rent increase to $1,875.00 per month effective January 1, 2018 (Plaintiff's Exhibit 9 to Plaintiff's Second Motion for Summary Disposition).
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> February 17, 2018: Plaintiff's letter gave notice of a rent increase to $2,300.00 per month effective March 1, 2018 (Plaintiff's Exhibits 4 and 11 to Plaintiff's Second Motion for Summary Disposition).

Dr. Creason did not pay the increased rents, despite reminders and demands from Dr. Kilpatrick. Under the terms of a month-to-month tenancy, the landlord is required to give a months' notice of a rental increase, and the statute of limitations has not run as to plaintiff's rental increase notices to Dr. Creason. As the parties dispute the allegations as to the post-February 2016 rental increases and payments, the allegedly unpaid rental increases, late fees, and service charges are reserved for the finder of fact.

As to question 3, in the Court's opinion and order of October 6, 2021, the Court found that there was no genuine dispute that Dr. Creason is liable to 601 S. Beacon for nine months of unpaid rent for the following nine months: September 2019, April 2020, August 2020, September 2020, October 2020, November 2020, December 2020, January 2021, and February 2021.[3] At oral argument, the parties agreed that the correct number of months is eight months rather than nine

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[3] Opinion and Order of October 6, 2021, p 5.

months because Dr. Creason's rent check for April 2020 was received by 601 S. Beacon but was returned uncashed. Regarding question 3, 601 S. Beacon's motion for summary disposition is granted as to *eight* months of unpaid rent (the amount of such rent remains in dispute).

As to question 4, in the Court's opinion and order of October 6, 2021,[4] the Court found that evidence produced through discovery demonstrated there was a genuine and material dispute as to the date on which Dr. Creason provided 601 S. Beacon with notice of the leak. That genuine and material dispute of fact continues and may not be resolved by summary disposition. Regarding question 4, 601 S. Beacon's motion for summary disposition is denied.

Dr. Creason's Motion

Dr. Creason asks that the Court dismiss 601 S. Beacon's claim for holdover rent, that is, plaintiffs' claim for unpaid or underpaid rent during the time that Dr. Creason was a tenant month-to-month.

The Court ruled on this issue in the opinion and order filed July 27, 2021:

> As to the (C)(7) ground, Dr. Creason argues that pursuant to the six-year statute of limitations for breach of contract,[5] plaintiffs' claim for holdover rent accrued either in 1999 or in 2009 and the statute of limitations ran against that claim in either 2005 or 2015. Plaintiffs respond that pursuant to paragraph 20, once the initial three-year term of the lease expired, Dr. Creason became "a tenant from month to month only," in effect entering into a new lease with the plaintiffs each month. Therefore, plaintiffs argue that the statute of limitations has not run because plaintiffs' claim for holdover rent did not accrue until March 1, 2021 when Dr. Creason vacated the leased premises.
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> Given plaintiff's argument that Dr. Creason entered into a new lease each month as a month-to-month tenant following the expiration of the original lease term, it does not necessarily follow that the holdover provision of the original lease continued as a term of each additional holdover month-to-month tenancy following the expiration of the original term. It appears that Plaintiff should have pursued enforcement of the holdover rent term of the original lease before the expiration of six years from the stated termination date. However, as discovery in this action is not yet complete, it cannot be said that no document or testimony may be unearthed acknowledging the holdover provision of the original lease as a continuing term of

[4] Opinion and Order of October 6, 2021, p 5.

[5] MCL 600.5807(9).

the month-to-month tenancy.

> *Even if the holdover provision of the original lease did not survive the expiration of the statute of limitations, this may not bar plaintiff's suit for unpaid or underpaid rent.* Based on (1) the undisputed fact that Dr. Creason continued paying rent after the lease expired, (2) the series of seven letters between the parties between April 21, 2008 and July 11, 2013 containing proposals and counter-proposals regarding modification and extension of the lease, (3) the February 16, 2016 email from Dr. Kilpatrick to Dr. Creason offering to reduce the rent to $1,750, and (4) Dr. Creason's payment of both increased and reduced rent, this Court finds that there is a genuine issue of material fact as to when plaintiffs' claim against Dr. Creason for unpaid or underpaid rent accrued and, consequently, *whether or not the statute of limitations has run against such claims*.[6]

MCL 600.5807(9), relied upon by defendant, states that "[t]he period of limitations is 6 years for an action to recover damages or money due for breach of contract that is not described in subsections (2) to (8)." MCL 600.5827 provides that "[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. The closest analogy in the listed sections is MCL 600.5836 which states that "[t]he claims on an installment contract accrue as each installment falls due."

With discovery now complete, the court concludes that Dr. Creason's obligation to pay holdover rent pursuant to Paragraph 20 of the Lease accrued with each rental payment during the holdover period. Plaintiff's claim for unpaid holdover rent (as well as any late fees or service charges) accrued each time he accepted a rent check that did not include the additional holdover rent (or late fees or service charges, as the case may be). He could have filed suit to collect the accrued (and accruing) unpaid rent at any time since 1999, but did not. As a result, the holdover rent which may have accrued during the period of 1999 – 2008 is now barred by the statute of limitations. When the parties changed the monthly rental amount by mutual agreement in September 2008, no holdover rent was included in the agreement, and none was thereafter payable. In other words, the agreement to modify rent in 2008 changed the terms of the Lease as to the rental amount, and as the parties did not revive the rent-related terms in the Lease, they did not

[6] Opinion and Order filed July 27, 2021, pp 3-4 (emphasis added).

survive the modification. Defendant is granted summary disposition as to plaintiff's claims with regard to double-rent.

Plaintiff filed the present action on March 13, 2020,[7] and plaintiffs' claims are therefore limited to rent and other charges which accrued after March 13, 2014. Defendant's motion for summary disposition is therefore granted as to any claims of the plaintiffs which occurred prior to March 13, 2014.

Conclusion

601 S. Beacon's motion for summary disposition brought pursuant to MCR 2.116(C)(10) is partially GRANTED as to question 1, with the clarifications noted above.

As to question 2, the Court finds that there is no genuine issue of material fact that the amount of monthly rent from October 2008 through July 2013 was $2,390.00 per month. From August 2013 through January 2016 the monthly rental amount was $2,440.00. Effective February 2016 the rental amount was $1,750 per month. Plaintiff's motion is partially GRANTED. There remain factual disputes as to any post-February 2016 rental amounts, and such disputes are reserved for the trier of fact.

As to question 3, the plaintiff's motion for partial summary disposition is GRANTED as to eight months' unpaid rent.

As to question 4, plaintiff's motion is DENIED and the factual dispute as to the date of notice is reserved for the trier of fact.

Dr. Creason's request for summary disposition pursuant to MCR 2.116(I)(2) is partially GRANTED and partially DENIED as noted above.

[7] Plaintiff initially filed this action in the Small Claims Division of the 58th District Court, and defendant then removed the case to the general civil division and demanded a jury trial (Case No. GH-20-062094-GC). After defendant counterclaimed seeking damages in excess of the jurisdictional limits of the district court, the case was removed to the 20th Circuit Court by order of October 5, 2020.

Dr. Creason's motion for summary disposition brought pursuant to MCR 2.117(C)(7) and MCL 600.5807(9) is GRANTED as to plaintiff's claims which accrued before March 13, 2014.

IT IS SO ORDERED.

Dated: December 3, 2021

Hon. Jon A. Van Allsburg, Circuit Judge

SEAL OF THE CIRCUIT COURT OF OTTAWA COUNTY MICHIGAN