

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

James M. Kozel, L.L.C.	:	
A Delaware Limited Liability	:	
Company	:	
	:	
Plaintiff,	:	C.A. No. 06-11-0166
	:	
v.	:	
	:	
Mulligan's Pizza Inc.	:	
A Delaware Corporation,	:	
and Joseph Girgis	:	
	:	
Defendants.	:	

Decision after Trial

Date of Trial: March 15, 2007

Date of Decision: March 21, 2007

Judgment for the Plaintiff, James M. Kozel

Ronald G. Poliquin, Esq., Young, Malmberg & Howard, P.A., 30 The Green, Dover,
Delaware 19901, Attorney for Plaintiff

Ronald D. Smith, Esq., Hudson, Jones, Jaywork & Fisher, 225 South State Street, Dover,
Delaware, 19901, Attorney for Defendants.

Trader, J.

In this civil action I hold that the plaintiff, James M. Kozel, LLC (“landlord”), is entitled to recover damages from Mulligans Pizza, Inc. and Joseph Girgis (“tenant”) because of the breach of their commercial lease agreement.

The relevant facts are as follows: On December 1, 2005, the landlord entered into a lease agreement with the tenant for a term of five years. The tenant’s obligations under the lease were guaranteed by Joseph Girgis, the president of the defendant corporation. The lease provided for rental payments of \$6,120.00 from February 1, 2006 through November 30, 2006, and rental payments of \$5,300.00 per month beginning December 1, 2006 through November 30, 2007. In addition to the payment of rent, the tenant was obligated to pay his pro-rated share of the city and county taxes, insurance, common area maintenance and other assessments. Under the terms of the lease, the landlord had no responsibility for any of the above costs in connection with the demised premises.

In September 2006, the tenant defaulted in the payment of rent for that month and he subsequently became delinquent in the payment of rent for the months of October and November 2006 as well as pro-rated real estate taxes, pro-rated property insurance, common area maintenance and a soft ball sponsorship. On December 1, 2006, the plaintiff filed a claim for distress for rent in Justice of the Peace Court 16 pursuant to 25 Del .C. Chapter 63. As a consequence of the rent distress, both the plaintiff and defendant were excluded from the demised premises until December 22, 2006. On that date, the magistrate awarded possession to the plaintiff and ordered the constable to proceed with the levied upon property.

The plaintiff has filed a civil action in this court to collect the balance of the rent due as well as other assessments, including interest and reasonable attorneys fees. The

defendant concedes the breach of the lease agreement as well as the amount set forth in Mr. Young's letter of October 17, 2006 (Plaintiff's Exhibit 2) subject to certain offsets. He also concedes that the rent in the amount of \$6,120.00 was not paid for November 2006. Therefore, there is an admission from the tenant that the sum of \$22,460.75 is owed to the landlord.

There is a dispute between the parties as to whether rent for the months of December 2006, January 2007, February 2007 and March 2007 is due from the tenant to the landlord. The dispute between the parties is governed by the terms of the lease. Additionally, there is nothing contained in 25 Del. C. Sec. 6301 *et seq.* that precludes the landlord from pursuing any remedy for arrears of rent after a distress for rent has been levied by the constable. The landlord's entitlement to rent is governed by paragraph 15 of the lease (plaintiff's exhibit one). Paragraph 15 provides in pertinent part as follows:

In the event Tenant shall default in the payment of the monthly rent, Landlord shall promptly so notify Tenant as provided herein and the failure of Tenant to cure such default with TWENTY (20) days written notice after receipt of such notice shall, at the option of Landlord, work as a forfeiture of this Lease Agreement, or Landlord may enforce performance in any manner provided by law, and Landlord, or Landlord's Agent, shall have the right without further notice to demand to re-enter the premises, if such re-entry and possession can be peaceably accomplished, the same to have again, possess, and enjoy, without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or breach of covenant(s), and in such case the Landlord may, at its election, re-let the Demised Premises, or any portion thereof, as the Agent of the Tenant and, notwithstanding, any such re-entry, the Tenant shall pay the Landlord the difference between the rent hereby reserved and agreed to be paid by Tenant for the portion of the term remaining at the time of re-entry and the net amount, if any, received or to be received under such re-letting for the remainder of the term after first deducting all of the Landlord's expenses in connection with said re-letting, including, without limitation, all repossession costs, brokerage commissions, legal expenses, alteration costs, and other such expenses necessary for the preparation of such re-letting.

Under paragraph 15, after the landlord re-takes possession of the property, the tenant is obligated to pay rent until the landlord re-lets the property. In that event, the tenant pays the difference between the amount agreed to under the lease and the amount the landlord receives as a result of the re-letting. Since early January 2007, the landlord has made efforts to re-rent the property but as of this date he has been unsuccessful. Therefore, the tenant owes the landlord \$5300.00 for December 2006, \$5300.00 for January 2007, \$5300.00 for February 2007 and \$2650.00 for one-half of March 2007. The total of the various amounts of unpaid rent, pro-rated insurance, pro-rated taxes as well as other expenses is \$41, 010.75. The landlord also seeks reimbursement for the tenant's pro-rated insurance in the amount of \$1,196.50 for the period of time beginning October 15, 2006. This invoice was not submitted to the tenant pursuant to paragraph 3(c) of the lease and was not introduced into evidence at trial. Therefore, it is rejected by the Court.

The tenant alleges that there are certain offsets to the amounts due from him to the landlord. He first claims that he was entitled to 50% of the proceeds from the vending machines. Plaintiff's attorney on oral argument acknowledges that this sum is a legitimate offset. Therefore, the defendant is entitled to an offset of \$3,081.31 which represents a 50% share of the vending machine proceeds for the period of time between February 1, 2006 and September 1, 2006.

The defendant also claims an offset for return of his security deposit. The defendant made a security deposit of \$5,900.00 and the landlord refuses to return this security deposit on the grounds that under paragraph twenty-one of the lease the tenant cannot return the demised premises in substantially the same condition as when the tenant

took possession. But the tenant offered un rebutted testimony that the only change he made to the premises was adding a chimney above the pizza oven and he further testified that the chimney could be removed for \$500.00. Under these circumstances the tenant is entitled to a return of \$5,400.00 of his security deposit. Therefore, subtracting the offsets of \$5,400.00 and \$3,081.31 from \$41, 010.75 leaves a balance of \$32,529.44 due the landlord. A calculation of landlord's damages is listed below:

Rent for September 2006	\$6,120.00
Rent for October 2006	6,120.00
Rent for November 2006	6,120.00
Rent for December 2006	5,300.00
Rent for January 2007	5,300.00
Rent for February 2007	5,300.00
Rent for one-half of March 2006	2,650.00
2005 to 2006 pro-rated city taxes	638.61
2005 to 2006 pro-rated county taxes	852.87
2005 pro-rated property insurance	1,635.27
2006 common area maintenance	148.00
2006 softball sponsorship	<u>826.00</u>
	\$41,010.75
Less:	
50% vending machine receipts	\$3,081.31
Return of part of security deposit	<u>5,400.00</u>
TOTAL	\$32,529.44

The plaintiff is also entitled to interest at the rate of 12% per annum seven days after any rent payment becomes due and payable under paragraph 2(c) of the lease. Therefore, the landlord is entitled to interest at the rate of 12% on the unpaid rent from September 8, 2006. Additionally, under paragraph 17 of the lease, the landlord is entitled to reasonable attorneys fees for any default of the tenant under the lease that requires the services of an attorney.

In accordance with these findings of fact and conclusions of law, judgment is entered in behalf of James M. Kozel, LLC and against Mulligans Pizza, Inc. and Joseph

Girgis for the sum of \$32,529.44 plus interest at the rate of 12% from September 8, 2006 plus reasonable attorney's fees.

IT IS SO ORDERED.

Merrill C. Trader
Judge