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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 EVERETT 4 CORNERS, LLC,

11 Plaintiff,

12 v.

13 KMART CORPORATION,

14 Defendant.

CASE NO. C11-1638JLR

ORDER DENYING CROSS-
MOTIONS FOR SUMMARY
JUDGMENT

15 This matter comes before the court on cross-motions for summary judgment
16 brought by property owner Everett 4 Corners, LLC (“Everett”) and its lessee, Defendant
17 Kmart Corporation (“Kmart”). (Defts. Mot. (Dkt. # 19); Pltfs. Mot. (Dkt. # 22).) The
18 case is about who should have to pay for the repaving of a Kmart parking lot. The parties
19 have a contract under which Kmart must reimburse Everett for maintenance expenses,
20 but Kmart claims Everett did not first obtain its written approval as the contract required.
21 Everett claims that, even if it did not obtain written approval, it properly invoked the
22 contract’s “emergency expenditures” exception and that Kmart, through its conduct,

1 waived the right to demand strict compliance with the agreement. Both parties insist that
2 the facts so plainly support their position that they are entitled to summary judgment. But
3 both parties cannot be right. The court holds that there are genuine issues of material fact
4 that preclude summary judgment and DENIES both motions (Dkt. ## 19, 22).

5 I. FACTUAL BACKGROUND

6 Defendant Kmart operates a department store in a shopping center on Evergreen
7 Parkway in Everett, Washington. (Decl. of Daryl Penn (Dkt. # 20) ¶ 2.) Kmart leases its
8 store space from Everett 4 Corners, an LLC owned by commercial real estate developer
9 Arthur Walker. (Decl. of Amit Ranade (Dkt. # 21) Ex. B at 29.) Everett owns both the
10 land on which the store sits and the parking lot surrounding the store, but Kmart has an
11 easement to use the parking lot under an agreement with Everett called “Reciprocal
12 Easement and Operation Agreement” (“REOA”). (Penn Decl. ¶ 3.) The terms of the
13 REOA, and how they allocate financial responsibility for repaving the Kmart parking lot,
14 are the subject of this lawsuit.

15 The repaving project in question was undertaken by Everett under circumstances
16 that are factually disputed. The parties agree that the parking lot was in a state of
17 disrepair before it was repaved, but they disagree about the extent of the disrepair and
18 how much of a hazard it posed to pedestrians and vehicles. (*Compare* Ranade Decl. Ex.
19 B at 121, Ex. A at 19; Penn Decl. ¶ 5 *with* Decl. of David Hosenpud (Dkt. # 24-4) Ex. 19
20 at 52, Ex. 7 at 35, Ex. 6 at 13.) Nevertheless, it is undisputed that Everett paved the
21 parking lot, that the project cost Everett \$181,144.87, that Everett invoiced Kmart for
22

1 \$130,723.99, and that Everett undertook the expense before obtaining Kmart's written
2 consent. (Pltfs. Mot. at 9-10, 12.)

3 Under the REOA, Everett, as landlord, is responsible for maintaining and repairing
4 the parking lot; Kmart, as tenant, is responsible for reimbursing Everett a pro rata share
5 of so-called "Common Area Maintenance" ("CAM") expenses. (Ranade Decl. Ex. B at
6 85-86.) For an expense to be classified as a CAM expense, the REOA says it must be
7 included in a yearly CAM budget. (*Id.* at 86.) However, the parties have never followed
8 this provision, and in their ordinary dealings they have simply used monthly invoices.
9 (Penn Decl. ¶ 4.) Nevertheless, the parties agree that under the REOA, Kmart is not
10 required to pay a pro rata share of an unbudgeted expense that would cost Kmart over
11 \$2,000.00 unless Everett first obtains Kmart's written approval before paying:

12 CAM Expenses shall not include the following:

13 . . .

14 (ii) Any item ("CAM Approval Item") of CAM Expenses not contained in a
15 CAM budget . . . if [Kmart's] Pro Rata Share of such item exceeds Two
16 Thousand Dollars (\$2,000), unless approved in writing in advance by
17 [Kmart]

18 (Ranade Decl. Ex. B at 86.) One pertinent exception is that Kmart must pay for
19 "emergency expenditures," which the REOA explicitly defines:

20 Notwithstanding the foregoing provisions . . . CAM Expenses shall include
21 all emergency expenditures which shall mean all reasonable expenditures
22 made by Developer in connection with the Common Areas in order to
rectify or mitigate any condition that imposes a real and immediate risk of
injury to person or serious and irreparable damage to property.

(*Id.* at 87.)

1 In this motion for summary judgment, Kmart argues that it does not need to
2 reimburse Everett for the paving project because Everett did not obtain Kmart's written
3 approval before undertaking the expense. Everett, in its cross motion, argues that it did
4 not need to obtain Kmart's written approval because the parking lot repair was an
5 "emergency expenditure," and that Kmart waived its right to demand strict compliance
6 with the contract terms. Further, Everett argues that it is entitled to summary judgment
7 that Kmart breached its duty to perform the contract in good faith.

8 II. ANALYSIS

9 This motion comes at a stage of the case where the parties disagree about many of
10 the facts material to resolving their dispute. This is fatal to a summary judgment motion.

11 A. Standard on a Summary Judgment Motion

12 Summary judgment is appropriate only if the evidence, when viewed in the light
13 most favorable to the non-moving party, demonstrates "that there is no genuine dispute as
14 to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
15 Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of*
16 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the
17 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
18 factual dispute is "genuine" if the evidence is such that reasonable persons could disagree
19 about whether the facts claimed by the moving party are true. *Aydin Corp. v. Loral*
20 *Corp.*, 718 F.2d 897, 902 (9th Cir. 1983). The moving party bears the initial burden of
21 showing there is no genuine issue of material fact and that he or she is entitled to prevail
22 as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her

1 burden, the non-moving party “must make a showing sufficient to establish a genuine
2 dispute of material fact regarding the existence of the essential elements of his case that
3 he must prove at trial.” *Galen*, 477 F.3d at 658.

4 [T]he issue of material fact required by Rule 56(c) to be present to entitle a
5 party to proceed to trial is not required to be resolved conclusively in favor
6 of the party asserting its existence; rather, all that is required is that
7 sufficient evidence supporting the claimed factual dispute be shown to
8 require a jury or judge to resolve the parties’ differing versions of the truth
9 at trial.

10 *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968). The court is
11 “required to view the facts and draw reasonable inferences in the light most favorable to
12 the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).

13 **B. Genuine Issues of Material Fact Preclude Defendant Kmart’s Motion for
14 Summary Judgment**

15 Whether summary judgment is appropriate turns on whether there is a genuine
16 dispute of material fact that the repaving project was an “emergency expenditure.”

17 As an initial matter, this is a factual question rather than a legal question. There is
18 no bright line rule separating questions of fact from questions of law, but when “the issue
19 falls somewhere between a pristine legal standard and a simple historical fact, the
20 fact/law distinction at times has turned on a determination that, as a matter of the sound
21 administration of justice, one judicial actor is better positioned than another to decide the
22 issue in question.” *Miller v. Fenton*, 474 U.S. 104, 114 (1985). In other words, if the
issue is of a type normally decided by courts, it is likely to be an issue of law, whereas if
the issue requires “experience with the mainsprings of human conduct” and “reference to
the data of practical human experience,” it is likely to be an issue of fact better left to the

1 jury. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978); *see also Lewis v.*
2 *Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983). Here, it requires no specialized judicial
3 knowledge to determine whether a dangerously unmaintained parking lot constitutes an
4 “emergency.” Instead, the actor called upon to decide this issue will refer to his or her
5 understanding of how humans experience danger and assess risk, how much danger is
6 tolerable, and other considerations drawing on the “data of practical human experience.”
7 *Nunez*, 572 F.2d at 1126. Thus, this is a determination better left to a jury—in other
8 words, a factual issue. Certainly, the court can interpret the parties’ contract and define
9 the scope of “emergency expenditure” as a matter of law, but whether this particular
10 situation qualifies as an emergency is a factual question.

11 More significantly, it is a factual question that Everett and Kmart dispute. This
12 dispute is material to resolving the case because it will affect its outcome, *see Anderson*,
13 477 U.S. at 248, and is genuine because both sides present evidence that would permit a
14 reasonable jury to find in their favor. (*Compare, e.g.*, Ranade Decl. Ex. A at 19 *with*
15 Hosenpud Decl. Ex. 19 at 52.) Kmart, for its part, presents evidence that the repaving
16 project was only intended to cure “normal fair wear and tear” (Ranade Decl. Ex. B at
17 121), that Everett’s local agent did not believe the project was an emergency (*id.* Ex. A at
18 19), that no one roped off the parking lot or took similar precautions one might expect in
19 an emergency (Penn Decl. ¶ 5), and that the true impetus for the repairs was not a state of
20 emergency but concern over a lawsuit taking place in Georgia (Ranade Decl. Ex. B at
21 12). Thus, Kmart’s evidence supports a reasonable inference that there was no
22 emergency. On the other hand, Everett presents evidence that the condition of the

1 parking lot was “dangerous” (Hosenpud Decl. Ex. 19 at 52), that it could be a “trip
2 hazard,” or cause damage to vehicles (Hosenpud Decl. Ex. 7 at 35), and that it “could
3 cause someone to trip and fall” (*id.* Ex. 6 at 13). This supports a reasonable inference
4 that there was an emergency. As such, the dispute is both genuine and material, and it is
5 impossible for the court to enter summary judgment in Kmart’s favor. *See Aydin*, 718
6 F.2d at 902.

7 There are further problems. In addition to disputing the ultimate conclusion of
8 whether the project was an emergency expenditure, the parties dispute the underlying
9 facts pivotal to making this determination: They disagree about the degree of danger
10 posed by the pavement hazards, the immediacy of the danger, and whether the danger
11 was “real” or “genuine.” (*Compare* Ranade Decl. Ex. B at 121, Ex. A at 19; Penn Decl.
12 ¶ 5 *with* Hosenpud Decl. Ex. 19 at 52, Ex. 7 at 35, Ex. 6 at 13.) These facts are material
13 because resolving them will affect a fact finder’s determination of whether the project
14 was an emergency expenditure, and hence will affect the outcome of the case. *See*
15 *Anderson*, 477 U.S. at 248. The dispute over these facts is also genuine because both
16 parties present evidence that would allow reasonable persons to disagree with the other
17 side’s version of the facts. (*Compare* Ranade Decl. Ex. B at 121, Ex. A at 19; Penn Decl.
18 ¶ 5 *with* Hosenpud Decl. Ex. 19 at 52, Ex. 7 at 35, Ex. 6 at 13.) Accordingly, the court
19 DENIES Defendant Kmart’s motion for summary judgment.¹

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22 ¹ This factual dispute is sufficient to resolve Defendant’s motion, but the court also points
out that there is at least one additional factual dispute making summary judgment inappropriate.
Everett argues that Kmart, through its conduct, showed such strong signs of approval for the

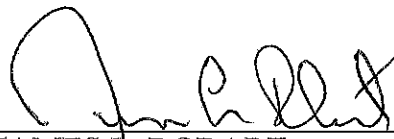
1 **C. Genuine Issues of Material Fact Preclude Plaintiff Everett's Cross-Motion for**
2 **Summary Judgment**

3 Everett cross-moves for summary judgment that Kmart violated the covenant of
4 good faith and fair dealing implicit in every contract by refusing to pay its pro rata share
5 of paving expenses. (Pltfs. Mot. at 15-16.) Everett's argument is cursory and does not
6 cite any authority holding that it is bad faith to insist on compliance with mutually
7 agreed-upon contract terms. (*See id.*) In any event, the parties vigorously contest the
8 facts necessary to establish a violation of the covenant of good faith and fair dealing, so
9 summary judgment is inappropriate at this time. (*Compare* Pltfs. Reply (Dkt. # 27) at 3-8
10 (citing Exhibits) *with* Dfts. Response (Dkt. # 26) at 2-4 (citing Exhibits).)

11 **III. CONCLUSION**

12 For the foregoing reasons, the court DENIES Kmart's motion for summary
13 judgment (Dkt. # 19) and DENIES Everett's cross-motion for summary judgment (Dkt.
14 # 22).

15 Dated this th 29 day of November, 2012.

16 
17 JAMES I. ROBART
18 United States District Judge
19

20 project that it waived its right to demand strict compliance with the agreement. (*See* Pltfs. Mot.
21 at 16-17.) A party can waive a contract provision meant for its benefit through "unequivocal acts
22 of conduct evidencing an intent to waive." *Mike M. Johnson, Inc. v. Cnty. of Spokane*, 78 P.3d
161, 166-67 (Wash. 2003). The facts as presented by Everett support a reasonable inference of
waiver when considered in the light most favorable to Everett, which is all that is required to
defeat summary judgment. (*See generally* Pltfs. Mot. at 17-18 (citing Exhibits).)