IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CENTREVILLE VETERINARY HOSPITAL, INC. and ESTATE OF STEPHEN P. BUTLER, VMD,	)	
Plaintiffs and Counterclaim-Defendants,	)	
v.	)	Civil Action No. 1552-VCP
MARGARET A. BUTLER-BAIRD,	)	
Defendant and Counterclaim-Plaintiff.	)	

MEMORANDUM OPINION

Submitted: March 21, 2007
Decided: July 6, 2007

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PARSONS, Vice Chancellor.

Plaintiffs, Centreville Veterinary Hospital ("CVH") and the Estate of Stephen Butler (the "Estate"), have petitioned the Court for a judgment declaring that a commercial real estate lease CVH executed in 1995 with its landlord, Margaret Butler-Baird, is still in effect and that CVH accepted an offer to renew the terms of the lease with a modified rent term providing for 3% annual rent increases. Defendant, Butler-Baird, has counterclaimed asking the Court to declare that the lease has terminated or expired no later than June 30, 2005, and that CVH has breached the lease, to enter an order ejecting CVH from the premises, and to award her damages for the period that CVH has held over after June 30, 2005.

For the reasons set forth herein, I find that, as of June 30, 2005, the lease between CVH and Butler-Baird had terminated because the parties failed to reach an agreement on the amount of rent CVH would have to pay if it exercised its option to renew the lease beyond that date. For relief, the Court will enter an appropriate declaratory judgment and order that CVH promptly vacate the disputed property at 5804 Kennett Pike, Centreville, Delaware. The Court also will order CVH to pay damages to Butler-Baird for the period from July 1, 2005, the day after the second term of the Lease terminated, until the date CVH vacates the property.

I. BACKGROUND AND FACTS

A. Parties

Plaintiff and counterclaim defendant Centreville Veterinary Hospital, Inc. is a Delaware corporation located at 5804 Kennett Pike, Centreville, Delaware.[1]

Plaintiff and counterclaim defendant the Estate of Stephen P. Butler is the sole shareholder of CVH (together with CVH, "Plaintiffs"). Stephen Butler ("Stephen") was the sole shareholder of CVH until his death in 2003.[2] Stephen's widow, Ann Butler ("Ann"), is the executrix of the Estate.

Defendant and counterclaim plaintiff, Margaret A. Butler-Baird ("Defendant"), was Stephen's mother, and at all relevant times owned the real property located at 5804 Kennett Pike, Centreville, Delaware (the "Property").[3]

B. Facts

Stephen's father, William F. Butler ("William"), was a veterinarian, and he owned and managed the veterinary practice of CVH at the Property since 1972.[4] William also co-owned the Property with his wife, Butler-Baird.[5] Stephen, the only one of the Butler

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1 Compl. ¶ 1; Answer ¶ 1; Joint Trial Ex. ("JX") 3 (Lease between Margaret A. Butler and Centreville Veterinary Hospital, Inc., dated Sept. 29, 1995 (hereinafter, the "Lease") at 1).

2 Compl. ¶ 16; Answer ¶ 16.

3 Transcript of trial held on Oct. 3-4 and 12, 2006 ("Tr.") at 16. Where it is relevant and not clear from the text, the identity of the witness testifying is indicated parenthetically.

4 Answer ¶ 6; Pls.' Resp. to Countercl. ¶ 6.

5 Tr. at 61-62.

children who went into veterinary medicine, practiced with his father at CVH for approximately ten years before William's death.[6] When William died in 1995, his shares of CVH passed to his estate, and sole ownership of the Property passed to Butler-Baird. In the same year, Stephen purchased the CVH shares from his father's estate for $475,000, an amount determined in accordance with a formula in his father's will.[7]

Contemporaneously with Stephen's purchase of CVH's stock, CVH and Butler-Baird executed a lease for the Property dated September 29, 1995 (the "Lease").[8] Butler-Baird's attorney drafted the Lease; he was not representing Stephen when he drafted it.[9] The Lease contains the following relevant provisions regarding its duration and the amount of rent due:

> 1. TERM. The Landlord hereby continues to lease to the Tenant and the Tenant continues to lease from the Landlord all those certain Leased Premises, as defined hereinafter, for a term commencing as of July 1, 1995, and ending on June 30, 2000, and the term of this Lease shall be automatically renewed, at Tenant's sole option, for four (4) successive five-year terms beyond June 30, 2000, unless the Tenant terminates or revokes this Lease by written notice to the Landlord at least sixty (60) days before the expiration of the term or each renewal term.
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> 2. LEASED PREMISES; USAGE. The Leased Premises hereunder shall consist of that certain lot … commonly referred to as 5804 Kennett Pike, Centreville, Delaware, consisting of approximately 3,000 square feet, more or less.

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6 Tr. at 62-63.

7 Tr. at 63-64.

8 Compl. ¶ 5; Answer ¶ 5; JX 3.

9 Tr. at 63-66 (Butler-Baird).

> The Leased Premises shall be used solely for carrying on a veterinary practice or veterinary hospital and any different usage shall cause a termination of this Lease.
>
> 3. RENT.
>
> (a) For the initial term, the Tenant shall pay to the Landlord as rent an amount equal to $2,500 per month, for a total of $30,000 per year in advance on the first day of each month, without prior written notice or demand.
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> (b) Each succeeding term, the annual rent herein provided shall be subject to adjustment by the mutual agreement of the parties.

The first term of the Lease passed relatively uneventfully. In the spring of 2001, when the parties still had not reached agreement for the 2000-2005 term, Butler-Baird offered CVH a new proposed lease agreement dated May 1, 2001 (the "Proposed Lease").[10] Butler-Baird signed the Proposed Lease before it was sent to Stephen. Although in most respects the Proposed Lease was identical to the original Lease, there were some important differences. The Proposed Lease changed the stated size of the Property from "3,000 square feet, more or less" to "approximately 4,288 square feet, more or less,"[11] and Paragraph 3 contained the following new rent provision:

> 3. RENT.
>
> (a) For the initial term, the Tenant shall pay to the Landlord as rent an amount equal to $2,875 per month, for a total of $34,500 per year in advance on the first day of each month, without prior written notice or demand.

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[10] Tr. at 104-05 (Butler-Baird); JX 4.

[11] JX 4 ¶ 2.

> (b) Each succeeding year, the annual rent herein provided shall be subject to adjustment of 3% annually.

Stephen made handwritten notations throughout his copy of the Proposed Lease clearly indicating that he was unhappy with many of its terms. He disapproved, for example, of the change in the stated square footage and put a large cross mark through the figure "4,288" and wrote beneath it "3,000." Adjacent to the new Paragraph 3(a) in the Proposed Lease, Stephen wrote, "Already enough for 5 years," and next to the new Paragraph 3(b) calling for 3% annual increases, he simply wrote, "No way." He then enclosed a copy of his marked version of the Proposed Lease in a handwritten letter to his attorney dated May 8, 2001.[12] In the letter, Stephen explained how "[m]y mother and I have fought over these lease terms for almost 1 year," and said "I have many problems with the Centreville lease." He then explained in detail how upset he was about what he considered to be the unfair and one-sided nature of the existing Lease's terms.[13] For example, Stephen complained about the plumbing, particularly the septic system and how it needed to be replaced. Toward the end of the letter, he wrote, "I would like some of these issues addressed in a lease now if possible."[14] Stephen then told Butler-Baird that he did not accept the Proposed Lease's terms,[15] and within approximately a month,

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12 JX 4.

13 *Id.*

14 *Id*.

15 Tr. at 105-06 (Butler-Baird).

Butler-Baird received a copy of the letter Stephen had written to his attorney and Stephen's marked version of the Proposed Lease.[16]

Shortly thereafter, Stephen and Butler-Baird had dinner together and discussed the status of the Lease.[17] They decided that Stephen temporarily would pay the increased rent his mother proposed while Stephen dealt with his personal problems. Between 2001 and 2003, Stephen and Butler-Baird had several other discussions concerning the Lease and the Property.[18] Among other things, they discussed the possibility that eventually Stephen would buy the Property from Butler-Baird, most likely after his divorce was finalized.[19] As Butler-Baird testified at trial:

> [Q.] So even in that line of questioning at any time did you mention the fact that this was only a month-to-month arrangement?
>
> A. You know, I think we both had that agreement. Since he didn't want to sign the lease and I was concerned legally if I didn't have a signed lease where I would be, what -- what liability I would have; and he assured me, "Mom, don't worry about it. Don't worry about it."
>
> We really never got into any of that discussion. There were too many things going on [in] both of our lives that, you know, the three-percent increase until he sold the building, got the divorce -- whatever that would be, that's how it would be so we wouldn't have any -- you know, there were other discussions not pertaining to business but to a lot of other family matters.

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16 *Id.* at 95, 105-06, 124-25, 135-36 (Butler-Baird).

17 Tr. at 107-10.

18 Tr. at 78, 91, 107-09, 133-34.

19 Tr. at 78, 107-09, 133-34.

> Q. And so it would be three percent -- from what you just told me, it would be three percent until he divorced or bought the building.
>
> A. Whatever came first.
>
> Q. Okay. And neither one of those events ever occurred.
>
> A. That's true.[20]

CVH and Butler-Baird did not reach a formal agreement, however, on this or any other major point of contention relating to the Lease, the Proposed Lease or the Property, including the term during which the rent increase would apply.

The parties evidently contemplated that Stephen or CVH would buy the Property, thus obviating many of the issues as to the Lease and Proposed Lease. CVH paid Butler-Baird $2,832.50 per month rent from September 2001 through August 2002 and has paid 3% more in rent beginning in September of each year thereafter.[21] Thus, CVH effectively has complied with Paragraph 3 of the Proposed Lease since 2001.[22] Butler-Baird, on the other hand, addressed one of the primary concerns Stephen expressed in his May 8, 2001 letter about the Property and any future lease by replacing the Property's old septic system sometime between 2001 and 2003.[23] Based on the record as to CVH and

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20 Tr. at 133-34; *id.* at 110.

21 Compl. ¶ 14; Answer ¶ 14; Tr. at 110, 140-41 (Butler-Baird).

22 The only caveat is that the amount CVH actually paid in September 2001, $2,832.50, is slightly less than the amount asked for in the Proposed Lease, which was $2,875.

23 JX 23; Tr. at 95, 126.

Butler-Baird's relationship during the period 2001 to 2003, I find that the parties agreed that Stephen would pay the proposed increase in rent until his marital and other problems subsided, Butler-Baird would do some maintenance on the Property, and the parties would proceed on an informal basis for the time being and postpone addressing other issues relating to the sale or lease of the Property. That was their interim solution.

Unfortunately, on October 20, 2003, three days before an uncontested divorce hearing whereby Stephen and Ann would have become legally divorced, Stephen tragically took his own life.[24] Ann became the executrix of his estate. Stephen's shares of CVH passed to the Estate and Ann, as the executrix, assumed responsibility for the management of CVH. After this change in CVH's management, its relationship with Butler-Baird deteriorated.

During the period from February 2004 to December 2004, Butler-Baird's attorney communicated to CVH's attorney several times that Butler-Baird believed the parties had not agreed to a new lease or rent amount for the first option period, running from July 1, 2000 to June 30, 2005. Because the parties had not agreed, Butler-Baird adopted the position that the Lease had terminated, and she offered CVH a new lease that would place the rent on the Property at an amount more consistent with her view of a fair market rent.[25] Butler-Baird also indicated that she thought CVH was breaching the use provision of the Lease, which requires that the premises be used solely for carrying on a veterinary

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[24] Tr. at 108.

[25] JXs 12, 29.

practice.[26] Butler-Baird's position at that time, and in this litigation, is that under 8 *Del. C.* § 603(2) of the Professional Service Corporation Act, under which CVH is organized, only a licensed veterinarian may own shares in a professional service corporation such as CVH. Ann is not a licensed veterinarian, and pursuant to 8 *Del. C.* § 616, the Estate had 375 days after Stephen's death to sell the shares to an appropriate person. Because the Estate had not sold the shares within the statutorily prescribed period, Butler-Baird claimed that CVH was violating state law and the Lease. In a letter from her counsel dated December 30, 2004, Butler-Baird unilaterally offered to extend the time for CVH to effect such a sale to March 1, 2005. The letter further stated that the if the Estate failed to effect a sale, the Lease would terminate at the end of the second term on June 30, 2005, and CVH would have to vacate the Property by that date.[27] Plaintiffs brought this suit seeking a declaration that the Lease, as modified by the new rent provision in the Proposed Lease, is valid and in effect between the parties.

C. Procedural History

CVH and the Estate filed their complaint on August 9, 2005 (the "Complaint"). Count I of the Complaint asks for a declaration that the Lease has not expired and that the option for renewal given to CVH in Paragraph 1 of the Lease is valid and effective. Because the parties disagree about who has the obligation to make repairs to the Property, Count II seeks a declaration of the rights and obligations of the landlord and tenant,

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[26] Lease at 2.

[27] Joint Pretrial Stipulation and Order filed Sept. 19, 2006 ("Pretrial Order" or "PTO") at 6, ¶¶ 19-21; JX 29.

respectively, regarding maintenance of the structural integrity of the Property. In Count IV,[28] Plaintiffs seek injunctive relief to prevent Butler-Baird from evicting CVH until the Court can determine the parties' respective rights and obligations under the Lease.[29] Count V accuses Butler-Baird of tortious interference with business relations in that she allegedly interfered with the Estate's attempts to sell CVH by refusing to acknowledge that CVH has not breached the Lease and that the Lease is still in effect, and by telling potential purchasers that she was going to evict CVH.

Butler-Baird filed an Answer and Counterclaim on September 22, 2005 ("Answer"). The Answer sets forth a number of affirmative defenses. By way of her Counterclaim, Butler-Baird asks the Court to: (1) declare that the Lease has terminated; (2) declare that CVH is in violation of the use provision of the Lease because the Estate has not sold the shares of CVH within the mandatory statutory period; and (3) declare that CVH is obligated to make repairs to the Property pursuant to the Lease and owes Defendant damages for not vacating the Property.

The Court conducted a trial on October 3, 4 and 12, 2006. By the time post-trial briefing began, Plaintiffs had withdrawn Count V of the Complaint for tortious interference with business relations and Defendant had withdrawn her counterclaim for a

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[28] What should be Count III of the Complaint is misnumbered as Count IV.

[29] Butler-Baird made no effort to evict CVH during the course of this litigation. Thus, I consider Count IV of the Complaint to be moot.

judgment declaring that CVH must make repairs to the Property.[30] Consequently, the parties have narrowed the issues requiring resolution by the Court.

A description of the issues Plaintiffs contend still remain appears in the following excerpt from the Pretrial Order:

> 1. Whether Defendant's tender of a signed lease which modified ¶ 3 of the lease to provide for annual 3% rent increases, was a written offer to modify ¶ 3 of the lease.
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> 2. Whether Stephen Butler's payment[s] of rent with 3% annual increases in rent constitute an acceptance of [Defendant's] offer.
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> 3. Does Defendant's action of accepting a 3% rent increase per year from Stephen in full satisfaction of rental amounts due from 2001 to 2003 evidence an agreement to modify the 1995 lease with the provision of the proposed lease which states that the rent will increase by 3% for the life of the lease?
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> ****
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> 7. Whether Plaintiff has complied with the use provisions of the 1995 lease, as amended that require the Premises to be used as a veterinary practice or veterinary hospital.[31]

In her answering post-trial brief, Butler-Baird identified the issues she asserts remain to be decided as follows:

> 1. Whether the 1995 Lease between Mrs. Butler-Baird and CVH terminated on June 30, 2005 because the parties never modified the 1995 Lease and did not come to an agreement on a rent adjustment for the next term.

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30 Pls.' Opening Post-Trial Br. ("POB") at 1; Tr. at 14-15.

31 PTO at 6-7. Paragraphs 5, 6 and 8 are omitted because they relate to issues that have been withdrawn, rendered moot or are otherwise no longer relevant to the Court's determination.

> 2. Whether Plaintiffs violated the use provision of the 1995 Lease by failing to transfer ownership of CVH within 385 [sic: 375] days of Stephen's death as required by 8 Del. C. § 616.
>
> 3. Whether it is necessary for the Court to determine which party has the obligation to make repairs to the Property since there is no existing lease agreement between Mrs. Butler-Baird and CVH.
>
> 4. Whether Mrs. Butler-Baird is entitled to damages in the amount of the fair rental value of the Property (minus the rent actually paid) because the 1995 Lease expired on June 30, 2005 and Plaintiff CVH still occupies the Property.[32]

Because I find that the Lease has terminated or expired, I need not address Plaintiffs' Count II seeking a declaration of the rights and obligations of CVH and Butler-Baird regarding repairs to the Property. I also dismiss as moot Defendant's claim for breach of contract based on an alleged violation of Paragraph 2 of the Lease, the use provision, because there was no lease between the parties for the period for which Defendant seeks damages. Thus, the issues requiring discussion are whether the Lease had terminated as of June 30, 2005, and, if so, to what extent, if any, Butler-Baird is entitled to damages for Plaintiffs' use of the Property thereafter.

II. ANALYSIS

A. Standard

This case presents questions of contract formation and the ability of a party to convey acceptance of an offer by partial performance. Once an offer has been rejected, the offeree no longer has the power to accept it and cannot revive the offer by tendering

[32] Def./Countercl. Pl.'s Answering Post-Trial Br. ("DAB") at 17.

acceptance.[33] At the latest, by the time Butler-Baird received the Proposed Lease back, unsigned and with Stephen's notations on it, and a letter explaining his objections to its provisions, Butler-Baird was on notice that CVH rejected the Proposed Lease.

Attempting to downplay the significance of Stephen's written comments on the Proposed Lease, Plaintiffs argue that "the scrawlings were an initial reaction to the proposed 3% increase, not a formal rejection."[34] Instead, Plaintiffs urge the Court to look to CVH and Butler-Baird's objective behavior to determine whether CVH accepted Defendant's offer. Plaintiffs contend that the fact that CVH paid, and Defendant accepted, rent increases on terms consistent with Paragraph 3 of the Proposed Lease indicates that CVH subsequently accepted Butler-Baird's offer. I disagree. I find that the letter dated May 8, 2001, which Stephen sent to his attorney with his markup of the Proposed Lease and ultimately conveyed to Butler-Baird approximately a month later, constituted a rejection of Butler-Baird's offer. As stated above, once CVH rejected Butler-Baird's offer, its power to accept the Proposed Lease terminated. Thereafter, CVH could not accept the Proposed Lease unless Butler-Baird re-offered it, and there is no evidence that Butler-Baird made such a re-offer.

Rather, the record shows that CVH paid the increased amount of rent while Stephen and his mother discussed the possibility of a new relationship between CVH and

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33 *PAMI-LEMB I Inc. v. EMB-NHC, LLC*, 857 A.2d 998, 1015 (Del. Ch. 2004); *Friel v. Jones*, 206 A.2d 232, 233-34 (Del. Ch. 1964); RESTATEMENT (SECOND) OF CONTRACTS § 38(1) ("An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention").

34 Pls.' Post-Trial Reply Br. ("PRB") at 3.

Butler-Baird, perhaps through Stephen or CVH buying the Property or through a new lease. The evidence indicates that Stephen resisted his mother's efforts to engage him in further discussions regarding a new lease because he was preoccupied at the time with other issues, such as his marital problems with Ann, and he hoped to buy the Property from his mother after his divorce was finalized. In that context, I find that Stephen's payment of the increased rent amount from 2001 to 2003 reflected his intent to maintain the status quo for the time being and dissuade his mother from pressing for a resolution of the new lease terms, not an acceptance of those terms. Further, I specifically find that neither Stephen nor CVH ever communicated to Butler-Baird during Stephen's lifetime, by payment of the increased rent or otherwise, an intent to modify the rent term of the 1995 Lease by changing the requirement of "mutual agreement of the parties" for adjustments to the annual rent to a provision that would make the rent "subject to adjustment of 3% annually" for each succeeding year for up to 20 years.

The official comment to Restatement (Second) of Contracts § 38 (on rejection) persuasively states the reasons for this bright line rule:

> a. *The probability of reliance.* The legal consequences of a rejection rest on its probable effect on the offeror. An offeror commonly takes steps to prepare for performance in the event that the offer is accepted. If the offeree states in effect that he declines to accept the offer, it is highly probable that the offeror will change his plans in reliance on the statement. The reliance is likely to take such negative forms as failure to prepare or failure to send a notice of revocation, and hence is likely to be difficult or impossible to prove. To protect the offeror in such reliance, the power of acceptance is terminated without proof of reliance. This rule also protects the offeree in accordance with his manifested intention that

> his subsequent conduct is not to be understood as an acceptance.

The rejection rule thus protects offerees as well as offerors. In this case, the offeree-tenant, CVH, argues that after communicating a clear rejection of the Proposed Lease, the fact that CVH paid the increased rent amount beginning in September 2001 constituted an acceptance of the modified rent term reflected in the Proposed Lease.[35] If that were the case, CVH would have to pay the increased rent for all subsequent option periods, which cumulatively could last as long as 20 years.

Although that position evidently suits Plaintiffs purposes today, I am not convinced that by paying the higher rent from September until October 2003, Stephen intended to obligate CVH to pay that amount until even the end of the second term on June 30, 2005. *A fortiori*, I do not believe that Stephen intended to agree that three percent annual rent increases would apply throughout the approximately 20 years

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[35] Interestingly, CVH emphasizes this characterization of what Stephen did to avoid a concession that he accepted the Proposed Lease itself. Plaintiffs make that strained distinction because they seek to maintain the advantages of the Landlord-Tenant Code as it existed in 1995. Under that version of the Code, the provision of the 1995 Lease purporting to make the tenant responsible for repair would not have been enforceable. *See Ford v. Ja-Sin*, 420 A.2d 184, 186 (Del. Super. 1980) (construing Delaware Landlord-Tenant Code effective since 1972 as having "effectively reversed the Common Law rule so as to place the duty of maintenance and repair on the landlord rather than the tenant"). The Delaware Legislature, however, amended the Landlord-Tenant Code in 1996 to provide that tenants could be made responsible for repairs in commercial leases. *See* 25 *Del. C.* 5101(b) (stating that rights "under any agreement for the rental of any commercial rental unit shall be governed by general contract principles"). If CVH and Butler-Baird had both signed the Proposed Lease in or after 2001, it presumably would have been subject to the amended version of the Code. Plaintiffs' theory seeks to avoid that result. The record adduced at trial, however, does not show that Butler-Baird would have offered the new rent term independently of the Proposed Lease.

remaining on the Lease, assuming CVH elected to exercise all of the remaining options. Thus, in my opinion, if the tables were turned, Butler-Baird probably could not hold CVH to a lease it so clearly rejected merely because it sought to maintain amicable relations with the landlord by paying an increased amount of rent while the parties negotiated. In other words, setting aside the fact that after CVH rejected Butler-Baird's offer it could not then accept it merely by paying the increased amount of rent, the evidence reveals no indication that Stephen or CVH intended to accept the Proposed Lease or a modification of the 1995 Lease to incorporate the new rent term in the Proposed Lease merely by paying the increased rent.

Having found that CVH rejected the Proposed Lease, I therefore conclude that Plaintiffs' theory, that by subsequently paying the increased rent CVH thereby accepted the Proposed Lease, fails for at least two independent reasons. First, there is no evidence that Butler-Baird re-offered the Proposed Lease or the specific rent provision contained in it. Second, the evidence does not support Plaintiffs' allegations as to CVH's intent.

The issues raised in this case and by the renewal option and price term in the Lease reflect a recurring dilemma in American contract law. On the one hand, in Paragraph 1 of the Lease, Butler-Baird commits herself to four, five-year option periods to be exercised *at the sole discretion of CVH*. This provision of the contract is clear and unambiguous. Yet, on the other hand, the language of Paragraph 3(b) indicating that, in each succeeding term, the rent "shall be subject to adjustment by the mutual agreement of the parties" undermines CVH's sole discretion over the exercise of the option because Butler-Baird can block CVH from exercising it by demanding an unacceptable rent.

While it does not appear that the Delaware courts have addressed this situation directly, other jurisdictions have done so, and the cases are in hopeless conflict. Some courts have held that the amount of rent due under a renewal option is a material term, and that the parties do not have an enforceable agreement for the new option period unless they agree on the rent.[36] Other courts have concluded that the trier of fact may supply a reasonable rent term for the parties.[37]

I think the first view is more consistent with the fundamental principle that contracts are based on an *agreement* and with the Delaware courts' general aversion to enforcing agreements to agree. Specifically, this Court has held that, "[a]n agreement to

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[36] *Etco Corp. v. Hauer*, 208 Cal. Rptr. 118, 122 (Cal. Ct. App. 1984) ("a provision for renewal of a lease at a rent to be determined in the future is enforceable, absent agreement of the parties, only if the lease agreement contains an ascertainable standard for the determination of such rent"); *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 544 (N.Y. 1981) (renewal clause with "annual rentals to be agreed upon" unenforceable for lack of specificity); *Walker v. Keith*, 382 S.W.2d 198, 205 (Ky. 1964) ("A renewal option stands on the same footing as any other contract right. Rent is a material term of a lease. If the parties do not fix it with reasonable certainty, it is not the business of courts to do so"); *see generally* Daniel E. Feld, Annotation, *Validity and Enforceability of Provision for Renewal of Lease at Rental to be Fixed by Subsequent Agreement of Parties*, 58 A.L.R.3d 500 (1974).

[37] *Kenai v. Ferguson*, 732 P.2d 184, 187 (Alaska 1987) ("Courts are no longer reluctant to supply lease terms when parties who, at the time of contracting agreed to set or renegotiate particular terms in the future, are unable to reach agreement. This is particularly true when the amount of rental is the term left to future agreement"); *Fletcher v. Frisbee*, 404 A.2d 1106, 1109 (N.H. 1979) ("When an option specifies that the new rent will be mutually agreed upon, a reasonable figure is implied"); *Drees Farming Ass'n v. Thompson*, 246 N.W.2d 883, 886 (N.D. 1976) ("a renewal covenant in a lease, which leaves only the rental to be determined by agreement of the parties, is not void for uncertainty because reasonable rent can be determined"); *see generally* 58 A.L.R.3d 500 (1974).

agree in the future without any reasonably objective controlling standards is unenforceable."[38] In the Lease, the parties agreed that the rent for future terms would be subject to adjustment by mutual agreement. This mere agreement to agree does not provide a reasonably controlling standard. In the context of this case, however, I need not definitively decide which of the two different approaches applied elsewhere controls, because none of the parties has sought to have this Court independently determine and impose a reasonable rent amount as part of their contract. Thus, in the absence of an agreement as to the rent applicable to the renewal term that was to begin on July 1, 2005, there is no lease applicable to that term.

It is understandable that landlords and tenants want to provide for lease options even though neither party wants to commit itself to the amount of future rent because real estate market conditions are difficult to predict. In such cases, the parties could choose a trusted third-party valuator to value the property at the time for renewal of the option and agree to abide by the valuator's determination, or the parties could each choose their own real estate experts and agree, for example, to average their respective valuations. There are a number of things landlords and tenants can do to provide a reasonably objective controlling standard to govern how future rent should be set. By doing so, they establish

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[38] *Heritage Homes of De La Warr, Inc. v. Alexander*, 2005 Del. Ch. LEXIS 128, at *12 (Sept. 1, 2005) (internal citations and quotations omitted); *Ramone v. Lange*, 2006 Del. Ch. LEXIS 71, at *47 (Apr. 3, 2006); *Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 Del. Ch. LEXIS 59, at *26 (Apr. 21, 1997) (the parties must have reached agreement on all material terms before an "agreement to agree" will be enforced"); *Hammond & Taylor, Inc. v. Duffy Tingue, Co.*, 161 A.2d 238, 239-40 (Del. Ch. 1960).

a definite *agreement* which a court or other arbitrating body may later enforce through monetary or injunctive relief. Otherwise, as the court in *Walker v. Keith*[39] observed when asked to enforce a rent option similar to the one in this case:

> In the first place, when the parties failed to enter into a new agreement as the renewal option provided, their rights were no longer *fixed* by the contract. The determination of what they were was automatically shifted to the courtroom. There the court must determine the scope of relevant evidence to establish that certainty which obviously cannot be culled from the contract. Thereupon extensive proof must be taken concerning business conditions, valuations of property, and reasonable rentals . . . . On appeal the appellate court must examine alleged errors in the trial . . . . the case may be reversed and the whole process begun anew. All of this time we are piously clinging to a concept that the contract itself fixed the rent with some degree of certainty.

In 1995, Butler-Baird and CVH could have adopted a means for determining the future rent in the event they could not agree in the future. They chose not to do so. Because the option contained in Paragraph 3 of the Lease is an agreement to agree, and because I find that the parties could not agree on a new rent applicable after the expiration of the second term on June 30, 2005, I find that the Lease terminated on that date, at the latest. Because Butler-Baird is not seeking damages for any period before June 30, 2005, it is unnecessary for me to determine whether CVH and Butler-Baird had a month-to-month agreement during the second term, or whether they effectively agreed to modify the rent provision of the Lease to provide for three percent annual increases

[39] 382 S.W.2d 198, 204 (Ky. 1964).

until the second term expired on June 30, 2005.[40] In either event, I find that Stephen did not commit CVH to the increased rent for the entire life of the Lease. Thus, there was no lease between the parties after June 30, 2005.

B. The Lease's Use Provision

Defendant alleges that CVH is violating Paragraph 2 of the Lease which requires that the Property "shall be used solely for carrying on a veterinary practice or veterinary hospital and any different usage shall cause a termination of this Lease."[41] The alleged

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[40] Plaintiffs challenge the credibility of Butler-Baird because, among other things, she testified for the first time at trial about an alleged agreement with Stephen under which she would accept rent at the three percent higher rate as part of a month-to-month lease arrangement. Butler-Baird had not mentioned a "month-to-month" lease in her pretrial pleadings and submissions or in her deposition. POB at 5-9. I agree that Butler-Baird's testimony regarding a month-to-month lease is confusing and not entirely credible. Accordingly, I have not relied on that characterization of the parties' agreement in reaching my conclusions.

An important aspect of the alleged inconsistencies in Butler-Baird's statements, however, relates to her deposition testimony regarding the differences between the 1995 Lease and the Proposed Lease. *See* Tr. at 130. In that context, I do not find Butler-Baird's testimony or the record to be inconsistent. As Butler-Baird testified, Paragraph 3(b) of the Proposed Lease did provide for a three percent rent increase for every subsequent year of the potentially 20 year term of the Proposed Lease. The more difficult question is, after Stephen rejected the Proposed Lease, what exactly did Stephen and his mother agree to when CVH began paying rent at a rate three percent higher than under the 1995 Lease. In my opinion, they agreed that CVH would pay the proposed three percent increase on a temporary basis until other issues in Stephen's personal life were resolved. Butler-Baird's use of the term "month-to-month" may well have been a litigation-induced, after-the-fact characterization of what was, in fact, the parties' informal, temporary arrangement. Thus, although I have not relied on Butler-Baird's testimony belatedly characterizing as "month-to-month" the arrangement she had with Stephen beginning in late 2001, I otherwise generally found her testimony to be credible.

[41] Lease at 2.

violation supposedly consists of the fact that pursuant to 8 *Del. C.* § 616 of the Professional Service Corporation Act, CVH's shares should have been sold within 375 days of Stephen's death, but CVH has yet to be sold. Defendant argues that the Lease, and specifically Paragraph 2, incorporate an implied promise that the premises will be operated lawfully and that CVH is violating the law. This argument is moot because Butler-Baird is only seeking damages from CVH for the period after the end of the second term of the Lease on June 30, 2005. Because I have found that the Lease terminated, at the latest, on June 30, 2005, the Lease, including the use provision, was not operative between CVH and Butler-Baird during any period for which Butler-Baird is seeking damages. This fact, coupled with my findings that Butler-Baird is entitled to possession of the Property and to an award of damages, as discussed below, render moot Defendant's counterclaim for breach of contract based on the alleged violation of the use provision.[42]

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[42] Even if Defendant's use claim were not moot because, for example, she argued (contrary to the record in my view) that she was seeking damages against the Estate, as well as CVH, on that claim, I would dismiss the claim for lack of merit. First, I do not think there has been a breach of the Lease because Paragraph 2 merely requires that CVH "shall be used solely for carrying on a veterinary practice or veterinary hospital." This provision does not require that CVH be organized as a professional corporation. Butler-Baird's attorney drafted the Lease. If she wanted to include provisions requiring CVH to be organized as a professional corporation, or requiring compliance with the Professional Services Corporation Act (the "Act"), 8 *Del. C.* §§ 601-619, Defendant could have included appropriate representations and warranties in the Lease. Second, Defendant has cited no cases indicating that this Court has the authority to, at the behest of a private citizen, enforce compliance with the Act. Finally, under the circumstances of this case, where part of the reason the Estate has not sold CVH is its dispute with Butler-Baird over whether the Lease is still in effect, it is not clear whether

C. Relief

Butler-Baird has petitioned the Court to issue an order ejecting CVH from the Property. "A common law cause of action for ejectment requires a plaintiff to prove two elements: (1) that it is out of possession; and (2) that it is entitled to possession."[43] In the present case, Butler-Baird unquestionably is out of possession of the Property. Since the Court has ruled that the Lease has terminated and that the parties did not agree on any new lease extending beyond June 30, 2005, it is also clear that Butler-Baird is entitled to possess the Property. The Court, therefore, will order that CVH promptly vacate the Property.

Butler-Baird also seeks damages for the period from July 1, 2005 until the date CVH vacates the Property. These damages, Defendant submits, amount to the difference between the rent CVH actually paid during this period and the Property's fair market rent for that period. The Pretrial Order states that Defendant seeks a declaration "that CVH must pay rent to Mrs. Butler-Baird at the fair-market rental rate of $6,250 per month from July 1, 2005 until the date CVH vacates the property, after deduction for credit in the amount of partial payments to date."[44] Plaintiff does not seriously dispute Defendant's

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the State would find that the Act has been violated and what, if any, remedy might be available, if it has been.

[43] *Rizzo v. Joseph Rizzo & Sons Constr. Co.*, 2007 Del. Ch. LEXIS 46, at *11 (Apr. 10, 2007) (citing *Old Time Petroleum Co. v. Tsaganos*, 1978 Del. Ch. LEXIS 686, at *9 (Nov. 3, 1978)).

[44] PTO at 9. At the post-trial argument, Defendant pressed for an award of damages against both CVH and the Estate, jointly and severally. The Pretrial Order, however, contains no indication that Defendant intended to seek damages against

theory of damages, i.e. determining a fair market rent and netting out the rent CVH actually paid after June 30, 2005. Rather, Plaintiffs challenge on several grounds Defendant's contention that a fair market rent would be between $5,500 and $6,250 per month, which equates to approximately $13.50 to $15.50 per square foot. Before turning to an evaluation of those objections, however, I note that in the post-trial briefing and argument, Butler-Baird further limited her request for damages to the lower bound of the alleged range, or $5,500 per month. Thus, I next examine whether the evidence supports a conclusion that $5,500 is a fair market monthly rent for the Property.

1. Defendant's claim for back rent

Butler-Baird bases her claim for damages on the report of Robert H. McKennon, owner and President of Appraisal Associates, Inc. McKennon has worked in the real estate appraisal field for approximately 30 years and has an impressive curriculum vitae, reflecting extensive appraisal experience with commercial properties in the Wilmington, Delaware area. Plaintiffs have not challenged McKennon's credentials. Therefore, I accept McKennon as a qualified expert on the issue of a fair market rent for the Property in question.

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the Estate, as well as CVH. Furthermore, Defendant has not presented any clear and persuasive factual evidence or argument for holding the Estate liable for the claimed back rent. Defendant neither demonstrated any basis for piercing the corporate veil to obtain damages against the Estate in its capacity as the owner of the CVH stock nor articulated any other basis for holding the Estate liable for damages. The only possible exception might be Butler-Baird's claim for breach of the use provision of the Lease. For the reasons discussed *supra*, however, I do not find that claim to be meritorious.

McKennon inspected the Property on June 29, 2004, and effective that date, stated his conclusions in a written report to Defendant's counsel dated July 8, 2004.[45] Based on his analysis, including consideration of six other properties he deemed relevant, McKennon concluded that:

> [A] reasonable annual market rent for the [Property], on a triple net basis, with annual increases in rent based upon the CPI or similar index, as of the effective date of June 29, 2004 would be from approximately **$66,000 ($5,500 per month) to $75,000 ($6,250 per month), which equates to approximately $13.50 to $15.50 per square foot of building area (4850 square feet).**[46]

In his report, McKennon noted several positives and negatives about the Property. The positives included its desirable location in Centreville, Delaware with a building that was "quite presentable from the front" and had "good visibility on the Kennett Pike" and improvements that "appear to function adequately for a veterinary practice." As negatives, McKennon mentioned the following characteristics of the Property: the floor plan being "somewhat cut up," the building being "very irregular in shape" with "tired" interior finishes, the limited parking, the less than optimum access to the second floor lunchroom, and the second floor apartment's independent access being a set of uncovered

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45 JX 16.

46 *Id*. at 3. Plaintiffs assert that the total area of the leased space is 4,288 square feet. POB at 23. For purposes of this opinion, I assume the 4,288 figure is correct. As to Plaintiffs' suggestion that McKennon failed properly to account for the approximately 990 square feet of residential space on the Property, the record shows to the contrary. *See* Tr. at 239 (McKennon).

exterior stairs at the side of the building.[47] In addition, I note that McKennon described his written report as a "limited, restricted valuation report," which he "considered a preliminary evaluation that should not be construed as a formal appraisal."[48]

Plaintiffs did not offer any expert report or testimony on a fair market rent. Instead, they challenged various aspects of McKennon's opinion. Plaintiffs emphasize that, although McKennon admitted that the only use of the Property is as a veterinary service, he did not consider any comparables with that same use. They further contend that the only evidence of a comparable property was testimony that the Talleyville Veterinary Practice rents a 3,000 square foot office in better condition for only $2,500 per month or $10 per square foot.[49] Plaintiffs also assert that McKennon conceded that 990 square feet of what both sides appear to accept is a total of 4,288 square feet should rent for between $9 and $11 per square foot. In addition, Plaintiffs argue that the closest comparable McKennon did use, 5700 Kennett Pike, in fact is not comparable, because unlike the Property, it is compliant with the Americans with Disabilities Act or ADA and does not require payment of $800 to $1,000 a month in septic pumping charges.[50]

I do not find Plaintiffs' reliance on the Talleyville Veterinary Practice persuasive for several reasons. First, Talleyville is a different location than Centreville, and the record is devoid of any expert or other helpful evidence that would enable the Court

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47 *Id*. at 2.

48 *Id*. at 4.

49 POB at 23.

50 *Id*.

reliably to compare the two properties in the context of their respective locations. Moreover, the rent for the Talleyville Veterinary Practice equates to only about $10 per square foot. McKennon testified that raw storage space in Centreville rents for between $10 and $11 per square foot.[51] Based on this evidence, I would expect the Property to command a rent materially higher than the Talleyville property.

Plaintiffs also failed to prove their point that the post-2003 operating costs of the septic system on the Property were $800 to $1,000 per month and that such an amount is materially above the market norm for operating costs for a veterinary practice, and therefore would justify a reduction in the fair market rent. In fact, evidence adduced by Butler-Baird tends to rebut that argument. In particular, relevant documents and testimony indicate that another veterinary group, Windcrest, actively considered leasing the Property on terms that would have required it to pay the maintenance costs of the septic system, as well as a rent amount at the high end of the range identified by McKennon.[52]

Plaintiffs also contend McKennon erred in relying on 5700 Kennett Pike as a comparable. This argument lacks merit. In evaluating the Property, McKennon determined that office space in the Centreville area rented for about $18 to $19 per square foot, with raw storage space renting for $10 to $11 per square foot. To develop a more precise estimate, McKennon considered several comparable properties in the vicinity.

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51 Tr. at 231-32.

52 *See* JXs 26, 48, 58 at TDH00235; Tr. at 370, 395-96.

One of those properties was 5700 Kennett Pike. Although Plaintiffs note certain differences between the two properties, McKennon accounted for those differences in arriving at a range of fair rental values for the Property significantly less that $18 per square foot.[53] Defendant now urges this Court to determine damages based on a fair market rent of $13.50 per square foot for the Property. I find that McKennon's analysis amply supports use of this rate.

In sum, Butler-Baird has demonstrated that a fair market rent for the period from July 1, 2005 to the date when CVH vacates the Property is $5,500 per month. Defendant's answering brief includes a chart showing the difference between a fair market rent of $5,500 and the rent actually tendered by CVH through January 2007.[54] For that period, the total amount due is $43, 552. Defendant has not presented a claim for prejudgment interest, and in the circumstances of this case, I do not believe any such interest is warranted.[55]

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53 JX 16 at 3; Tr. at 242-47.

54 DAB at 47.

55 Plaintiff filed this action in August 2005. The record provides no basis to conclude that one side or the other is more responsible for the extended time it took to reach a final resolution of this matter. Furthermore, Butler-Baird's counsel drafted the 1995 Lease with the open-ended provision for adjustment of the annual rent in succeeding terms by mutual agreement of the parties. That provision coupled with the decision of Stephen and his mother, Butler-Baird, to proceed informally by way of a temporary, ill-defined arrangement for approximately two years, contributed significantly to the uncertainty that led to this litigation. In these circumstances, I find that an award of prejudgment interest would not comport with principles of equity.

III. CONCLUSION

For the reasons stated, Butler-Baird is entitled to a declaratory judgment that the Lease she had with CVH had terminated by June 30, 2005 because the parties did not reach agreement on a rent adjustment for the term following that date. The Court will deny Plaintiffs' request for declaratory relief inconsistent with that conclusion. The parties' respective claims and counterclaims for declaratory and other relief based on the alleged violation of the use provision will be dismissed as moot, because the Lease is no longer in effect. For similar reasons, the Court need not determine which party is responsible to make repairs to the Property. Finally, Butler-Baird is entitled to recover as damages from CVH for the period from July 1, 2005 until CVH vacates the Property the amount by which the fair market rent of $5,500 per month exceeds the rent CVH actually paid during that period.

Defendant's counsel shall prepare and file, on notice, within ten days of the date of this Opinion an appropriate form of order to implement these rulings.