

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOHN A. PARKINS, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Route 40 Holdings, Inc. v. Tony's Pizza & Pasta, Inc. and
Leo John Ramunno
C.A. No. 10C-03-057 JAP**

Submitted: May 21, 2010
Decided: May 27, 2010

On Plaintiff's Motion to Dismiss Defendants' Counterclaims
GRANTED in part;
DENIED in part.

Dear Counsel:

This case arises from an alleged breach of a commercial lease for failure to pay rent. Plaintiff has moved to dismiss Defendants' counterclaims which allege that Plaintiff (1) failed to mitigate its damages and (2) violated the Fair Debt Collection Practices Act ("FDCPA"). For the

reasons stated below, the Court will treat Defendants' mitigation claim as a defense and will dismiss their FDCPA claim.

Facts

Plaintiff Route 40 Holdings, Inc. entered into a commercial property lease with Defendant Tony's Pizza & Pasta, Inc. on May 1, 2008. Defendant Leo John Rammuno, the president of Tony's Pizza, guaranteed payment of the obligations under the lease. Plaintiff filed a complaint in this Court alleging that Tony's Pizza breached the lease by failing to make monthly payments since April 2009. In the answer to the complaint Defendants asserted three counterclaims against Plaintiff: (1) Tony's Pizza overpaid rent because the leased space was smaller than stated in the lease; (2) Plaintiff failed to mitigate its damages by renting to another tenant; and (3) Plaintiff violated of the Fair Debt Collection Practices Act. Plaintiff has moved to dismiss the second and third counterclaims. Plaintiff does not challenge Defendants' first counterclaim at this stage of the proceedings.

Standard of review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law.”¹

When considering a motion for summary judgment, the facts must be viewed “in the light most favorable to the nonmoving party.”² Furthermore, “[f]rom those accepted facts the court will draw all rational inferences which favor the non-moving party.”³

Analysis

A. Failure to mitigate

Defendants claim that Plaintiff failed to mitigate its damages by refusing to lease the premises to a new tenant. Generally, a party cannot recover damages for a loss which could have been avoided through reasonable efforts.⁴ Courts often refer to this concept as a “duty to mitigate,” although technically it is not a duty because “there are no damages for breach of the duty; rather the plaintiff simply cannot recover those damages that it could have avoided.”⁵ Accordingly, a claim that a party failed to mitigate is properly pled as a defense rather than a counterclaim.

¹ Super. Ct. Civ. R. 56(c)

² *Mason v. USAA*, 697 A.2d 388, 392 (Del. 1997).

³ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

⁴ *E.g., Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 WL 1111179, at *12 (Del. Ch.).

⁵ 24 WILLISTON ON CONTRACTS § 64:27 (4th ed.). *See also West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779 (Del. Ch.) (“Although often described as a “duty to mitigate,” the injured party is under no obligation to do so, although it will not be awarded damages for any loss that could be avoided.”).

Under Superior Court Civil Rule 8(c), “[w]hen a party has mistakenly designated a defense as a counterclaim . . . the Court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.”⁶ Therefore, the Court will treat Defendants’ failure to mitigate claim as a defense rather than a counterclaim.

B. Fair Debt Collection Practices Act

Defendants claim that an agent of Plaintiff disclosed the facts of this case to a third party in violation of the Fair Debt Collection Practice Act and that Plaintiff should be liable for this alleged violation. Under the FDCPA, a “debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.”⁷

The FDCPA defines the term “debt” as “any obligation . . . of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are

⁶ Del. Super. Ct. R. 8(c).

⁷ 15 U.S.C. § 1692c(b).

primarily for personal, family, or household purposes”⁸ The failure to pay rent under a commercial lease is therefore not “debt” under the FDCPA.

In addition, the FDCPA defines the term “debt collector” as “any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . .”⁹ This Court has stated that the term “debt collector” does not include creditors of the consumer.¹⁰ Therefore, because Plaintiff is not in the business of collecting debts and is a creditor of Defendants, it does not qualify as a “debt collector” and cannot be liable under the FDCPA.¹¹

In addition to its request to dismiss the FDCPA claim, Plaintiff also seeks its costs and attorney’s fees in defending against that claim. Section 1692k(a)(3) provides that “[o]n a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.”¹² While the Court finds that there is no legal

⁸ *Id.* at § 1692a(5).

⁹ *Id.* at § 1692a(6).

¹⁰ *Shuler v. Daudt*, 1989 WL 16974 (Del. Super.).

¹¹ *Id.* (stating that the FDCPA “does not impose liability on a party which engages or uses a debt collector but applies only to the debt collector”).

¹² 15 U.S.C. § 1692k(a)(3).

basis for Defendants' FDCPA claim, it cannot conclude on the basis of this record that the claim was brought "in bad faith and for the purpose of harassment." Therefore, the Court will not require Defendants' to pay Plaintiff's costs and attorney's fees associated with defending against this claim.

Conclusion

Defendants' counterclaim that Plaintiff failed to mitigate damages will be treated as a defense rather than a counterclaim. Defendants' counterclaim that Plaintiff violated the FDCPA is **DISMISSED**.

IT IS SO ORDERED.

cc: Prothonotary