IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONCORD MALL, LLC,	)	
	)	
Plaintiff,	)	C. A. No. 02C-09-267 PLA
v.	)	
	)	
BEST BUY STORES, L.P., a Delaware limited partnership, and **BEST BUY CO., INC.**, a Minnesota corporation,	)	
	)	
Defendants.	)	

Date Submitted: May 28, 2004
Date Decided: July 12, 2004

UPON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART; DENIED IN PART.

UPON PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART; DENIED IN PART.

ORDER

Daniel R. Losco, Esquire, Margaret F. England, Esquire, Losco & Marconi, P.A., Wilmington, Delaware, Attorneys for Plaintiff.

G. Kevin Fasic, Esquire, Tighe, Cottrell & Logan, P.A., Wilmington, Delaware and Jeffrey M. Bryan, Esquire, Minneapolis, Minnesota, Attorneys for Defendants.

ABLEMAN, JUDGE

Before the Court is a Motion for Summary Judgment filed by Best Buy Stores, L.P. and Best Buy Co., Inc. (collectively, "Defendants") requesting that the Court grant their motion for summary judgment pursuant to Superior Court Civil Rule 56. Defendants contend that Concord Mall, LLC ("Plaintiff") is not entitled to any relief because Defendants did not breach the terms of the commercial shopping mall lease with Plaintiff. Defendants amended their answer to add a counterclaim, and seek summary judgment on the counterclaim as well. Plaintiff filed a cross motion for summary judgment, seeking summary judgment upon its complaint and counterclaim. The crux of the dispute centers on the appropriate interpretation and application of a provision of the lease agreement between the two parties regarding which party is obligated to pay the Delaware Gross Receipts Tax and the 2000-2001 real estate taxes.

Factual Background

Plaintiff and Defendants entered into a lease agreement, dated November 22, 1999, under which Defendants would rent space for use of their retail store in the shopping center owned and operated by Plaintiff. The commencement date of the lease was November 22, 2000, the date that Defendants' business opened to the public. On September 27, 2002, Plaintiff filed a complaint alleging breach of contract because Defendants failed to reimburse Plaintiff for $57,138.59 in taxes

that the Plaintiff had paid to New Castle County and to the State of Delaware pursuant to the terms and obligations of the lease agreement.

The complaint alleged that Defendants failed to reimburse the Plaintiff for $57, 138.59 in taxes that New Castle County and the State of Delaware charged the Plaintiff. The amount in dispute consisted of Defendants' pro rata share equal to: 1) $37,083.34 for 2002 real estate taxes; 2) $11,767.96 for New Castle County taxes and New Castle County Local School District taxes for a portion of the fiscal year 2000-2001; and 3) $8,287.29 for gross receipt taxes through the time of filing of the complaint. On October 15, 2002, Defendants paid $37,083.34 to the Plaintiff for the undisputed portion of the amount requested in the complaint.

On November 30, 2001, Defendants paid $2,591.89 to Plaintiff, which represented the amount of New Castle County property tax for the fiscal year 2000-2001 assessed against Plaintiff, prorated for the number of days in calendar year 2000 that Defendants occupied the leased premises. Defendants subsequently filed a counterclaim alleging that they should not have paid the $2,591.89, because, in hindsight, they believed that the lease did not obligate them to pay Plaintiff's property taxes, which were payable, due, assessed, etc. prior to the commencement date of the lease. In addition, since the filing of the complaint, Plaintiff alleges that the amount of gross receipt taxes has increased to $13,309.32.

Pursuant to Superior Court Civil Rule 16.1, on May 8, 2003, the case was ordered to arbitration. The arbitration was held on July 31, 2003, and an arbitrator's award was entered on August 5, 2003. Damages were awarded in the amount of $20,055.25, together with costs assessed against the Defendants, along with pre-judgment interest and attorney's fees incurred for collection of the real estate property tax, but not the Gross Receipts Tax. The arbitrator held that the Gross Receipts Tax issue "is the object of a good faith dispute." Defendants appealed the arbitrator's award and filed a Demand for Trial *De Novo* on August 13, 2003. At an office conference held with the Court on February 17, 2004, the parties indicated that this matter would most likely be resolved through cross-motions for summary judgment. With that in mind, the Court established a briefing schedule, with the option of hearing oral argument if necessary, following receipt of the memoranda in the matter. Upon review of the parties' briefs, the Court finds that oral argument is not required and renders its decision forthwith.

Contentions of the Parties

In its motion for summary judgment, Defendants contend that it does not owe the remaining two amounts, $11,767.96 in real estate taxes, and $8,287.29 in gross receipt taxes, because the lease expressly protects Defendants from either alleged tax obligation. Defendants predicate their motion on two grounds: "(1) that the Gross Receipts Tax is not a substitute in whole or in part for a Delaware state

property tax; and (2) the unambiguous language of the Lease obligates Best Buy to pay only those property taxes that were assessed, levied, payable, due, charged, etc., after the Commencement Date of November 22, 2000."[1] With regard to the Gross Receipts Tax issue, Defendants ask the Court to opine on the respective obligations of the parties under the lease, and to address the fundamental nature of Delaware's Gross Receipts Tax.[2] Defendants argue that the Plaintiff is not entitled to reimbursement under the terms of the lease agreement for "every kind of tax on rental payments."[3] Defendants assert that Plaintiff has the right to reimbursement of taxes on rental payment under the lease, only where those taxes are a *substitute*, *in whole, or in part*, for real property taxes.[4] As the Court will explain hereinafter, it emphasizes this phraseology, extracted directly from Paragraph 25 of the lease, because of the contractual significance it imposes on a proper interpretation of the parties' associated responsibilities for the Gross Receipts Tax, linked in whole, and in part, to the objective intent of the parties within the four corners of the contract. In light of Defendants' interpretation of the nature and scope of Delaware's Gross Receipts Tax, Defendants claim that it is not a substitute for a tax on the overall

[1] Defendant's Motion for Summary Judgment, filed January 28, 2004, at 6 (hereinafter "Def.'s Mot. for Summ. J. at ___.").
[2] Defendant's Memorandum of Law in support of its motion for summary judgment, filed April 30, 2004, at 2 (hereinafter "Def.'s Mem. at ___.").
[3] Def.'s Mem. at 2.
[4] Def.'s Mem. at 2 (emphasis added).

ownership of the real estate, i.e., the leased premises, nor is it a substitute for a real estate tax.[5]

With respect to the second issue, that of reimbursement of the 2000-2001 real estate tax payment to Plaintiff, Defendants contend that, pursuant to various terms of the lease agreement, Defendants are only liable for real estate taxes, which are due and payable under the lease term. Since the disputed real estate taxes at issue were due, payable, assessed, and paid, before the lease term commenced, Defendants argue they are not obligated to pay them.

In Plaintiff's cross-claim for summary judgment, Plaintiff disputes Defendants' contention that the Delaware Gross Receipts Tax is not a tax on rents substituting for a real estate tax, which is specifically provided for under the lease. Plaintiff first points out that, pursuant to Paragraph 25 of the lease, Defendants are solely responsible for "all municipal, county, state, and federal taxes assessed or levied against the leasehold interest," and, are also obligated to pay any taxes which are "taxes or excises on rents levied or assessed against Plaintiff," if they are measured by, or on account of, the rent paid under the lease.[6] Plaintiff maintains that the Delaware Gross Receipts Tax is a tax levied against the leasehold interest belonging to Defendants pursuant to the lease.[7] Relying on the definition of what

[5] Def.'s Mem. at 2-15.
[6] Plaintiff's Cross Motion for Summary Judgment, filed April 5, 2004, at 3, 4-7 (hereinafter "Pl.'s Cross Mot. for Summ. J. at ___.").
[7] Pl.'s Cross Mot. for Summ. J. at 4-7.

constitutes a commercial lessor under §2301(a)(6) of Title 30, Chapter 23 of the Delaware Code (Occupations requiring licenses; definitions; fees; exemptions), Plaintiff contends that it is a "commercial lessor," and therefore, the Gross Receipts Tax is applicable. Further, Plaintiff argues, pursuant to 30 *Del. C*. § 2301(e)(6), gross receipts for commercial lessors are comprised of the "rental payment received for a commercial unit."[8] Because Defendants are obligated under the lease to pay state taxes assessed against any leasehold interest conveyed in the lease, and the gross receipts from the rental payments under the leasehold estate are taxed by the State of Delaware, Plaintiff maintains that Defendant is responsible for payment of the Gross Receipts Tax.[9]

In response to Defendants' contention that they are not responsible for the payment of their pro rata share of the real estate taxes beginning on the commencement date, Plaintiff contends that a plain reading of the lease provisions clearly indicates that Defendants are responsible for their pro rata portion of the real estate taxes assessed for the tax year 2000-2001. Because Defendants are obligated to pay all real estate taxes and all installments of assessments payable with respect to the demised premises during the lease term, and because such payment shall be proportionally adjusted during the first and last years of the term,

[8] Pl.'s Cross Mot. for Summ. J. at 3-7.
[9] Plaintiff's Reply Brief in Support of Plaintiff's Motion for Summary Judgment, filed May 25, 2004, at 2-7 (hereinafter "Pl.'s Reply Br. at ___.").

so Plaintiff argues, Defendants are liable for their appropriate pro rata share pertaining to the defined tax period, even though the taxes were assessed, due, payable, and paid before the lease commencement date.[10]

In addition, Plaintiff submits extrinsic evidence along with its brief, which it requests the Court to consider. The extrinsic evidence consists of various transmittals of marked-up and black-lined versions of the lease agreement, exchanged in the negotiation stage between the two parties. The transmittals reflect numerous changes and/or comments made to the lease agreement between the parties.

Standard of Review

Summary judgment may only be granted where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, "show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law."[11] The Court must view the facts in a light most favorable to the non-moving party.[12] The moving party bears the initial burden of showing that a genuine material issue of fact does not exist.[13] If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that

[10] Pl.'s Cross Mot. for Summ. J. at 9-11; Pl.'s Reply Br. at 8-10.
[11] DEL. SUPER. CT. CIV. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[12] *Merrill v. Crothall-American, Inc*., 606 A.2d 96, 99-100 (Del. 1992).
[13] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

there are material issues of fact.[14] If, after viewing the record in the light most favorable to the non-moving party, the Court finds no genuine issue of material fact, summary judgment is appropriate.[15] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[16]

Discussion

In order to facilitate a determination of the issues in dispute, it is essential that the Court review the lease agreement and interpret its terms and conditions accordingly. The proper interpretation of a contract is purely a question of law.[17] The principles of interpretation are well settled. Contracts are to be interpreted as a whole to give effect to the intention of the parties.[18] When contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning.[19] A contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.[20] The true test is not what the parties

[14] *Id*.
[15] *Alabi v. DHL Airways, Inc*., 583 A.2d 1358, 1361 (Del. Super. Ct. 1990); *Hammond v. Colt Indus. Operating Corp*., 565 A.2d 558, 560 (Del. Super. Ct. 1989).
[16] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[17] *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co*., 616 A.2d 1192, 1195 (Del. 1992).
[18] *Northwestern Nat'l Ins. Co. v. Esmark, Inc*., 672 A.2d 41, 43 (Del. 1996).
[19] *Johnston v. Talley Ho, Inc*., 303 A.2d 677, 679 (Del. Super. Ct. 1973).
[20] *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co*., 731 A.2d 811, 816 (Del. 1999).

intended, but what a reasonable person in the same position of the parties would have thought it meant.[21]

Further, when parties to a contract reduce to writing part, or all of the agreement, should a dispute arise, a party may not seek to introduce evidence of earlier negotiations in an effort to show that the terms of the agreement are other than as shown on the face of the writing.[22] Known as the parol evidence rule, this principle bars a party from introducing extrinsic evidence to alter, modify, or contradict the terms of the writing.[23] Only in limited circumstances will parol evidence be admissible, such as when the terms of the parties' agreement are ambiguous,[24] or to show 'that the agreement was rendered invalid, void, [or] voidable by such causes as fraud,[25] illegality, duress, mutual mistake,[26] lack or failure of consideration, and incapacity.'[27] In general, a court should not consider extrinsic evidence when presented with clear and consistent unambiguous terms of a contract.[28] In other words, where a contract is not ambiguous, extrinsic evidence will not be used to interpret it.[29]

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[21] *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196.
[22] *See* 32A C.J.S. *Evidence* § 1132 (2003) ("Parol evidence is inadmissible to vary, alter, or contradict a written instrument or terms thereof where the instrument is complete, integrated, final, unambiguous, and valid").
[23] *See Carey v. Shellburne, Inc*., 224 A.2d 400, 402 (Del. 1966).
[24] *James River-Pennington, Inc. v. CRSS Capital, Inc*., 1995 WL 106554, at *6 (Del. Ch.).
[25] *American Home Prods. Corp. v. Norden Labs, Inc*., 1991 WL 138506, at *4 (Del. Ch.).
[26] *Id.*
[27] *Rodgers v. Erickson Air-Crane Co*., 2000 WL 1211157, at *4 (Del. Super. Ct.) (quoting Richard A. Lord, 11 WILLISTON ON CONTRACTS § 33:17 (4th ed. 1992); Restatement (Second) of Contracts § 214 (d)).
[28] *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991) ("If the instrument is clear and unambiguous on its face, neither [the Delaware Supreme Court] nor the trial court may consider parol evidence 'to intepret it or search for the parties' intent[ions] . . . .'" (quoting *Hibbert v. Hollywood Park, Inc*., 457 A.2d 339, 343 (Del. 1983)).
[29] *E.I. duPont de Nemours & Co. v. Allstate Ins. Co*., 693 A.2d 1059, 1061 (Del. 1997).

In order for the parol evidence rule to apply, one must first look to the contract and determine if it is a "fully integrated agreement."[30] The factors to be assessed in ascertaining whether a contract is fully integrated include: "whether the writing was carefully and formally drafted, whether the writing addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intentions of the parties."[31] Where a written agreement is intended to be final and complete, it is a totally integrated contract. If a written agreement is final and incomplete, it is a partially integrated contract.[32] A contract is completely integrated if, on its face, it is clear that the parties intended the writing to be a final and total expression of their agreement.[33]

That being said, after a careful review of the record, it is the Court's opinion that the lease agreement is unambiguous, and represents the final, completely integrated, agreement between the parties. Ambiguity does not exist where the Court can determine the meaning of a contract "without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends."[34] It is the Court's further determination that, with regard to the issues in controversy, there is no ambiguity in this contract that would

[30] *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch.).
[31] *Id*. (citing *Scott-Douglas Corp. v. Greyhound Corp*., 304 A.2d 309, 316 (Del. Super. Ct. 1973)).
[32] *McGrew v. Vanguard Corp*., 1979 WL 4635, at *3 (Del. Ch.); Richard A. Lord, 11 WILLISTON ON CONTRACTS § 33:1 (4th ed. 1992).
[33] *McGrew*, 1979 WL 4635, at *3.
[34] *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196 (citing *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. App. 1983)).

permit the extrinsic evidence, which the Plaintiff seeks to have considered, to be admitted. Here, the lease agreement represents a formal document, evidencing the typical degree of care associated with creating a leasehold estate between a shopping mall lessor and a major retail chain lessee.

The Gross Receipts Tax Issue

The controversy over which the parties are in disagreement centers on interpretation and application of the critical language of Paragraph 25 of the lease entitled "Real Estate Taxes." The language of the lease best expresses the intentions of the parties. Paragraph 25 provides, in pertinent part:

> Tenant shall pay all real estate taxes and all installments of assessments (collectively, the "Taxes") payable with respect to the Premises during the Lease Term promptly as the same shall become due and before interest or penalty accrues thereon . . . ."Taxes" shall mean and include all real property taxes and assessments levied or assessed upon the Shopping Center or any portion thereof during the term hereof, ...

As such, the lease provides that the Defendants will be responsible for, and are obligated to pay, all real estate taxes associated with the demised premises (approximately forty-six thousand seven hundred eight square feet of retail space) during the lease term. In other words, Defendants are obligated to pay taxes assessed against their own property interest, i.e., leasehold interest, which they own, and against any personal property that might be subject to direct taxation.

The leasehold interest consists of the intangible interest owned by Defendants, as the tenant, as transferred from Plaintiff, as landlord, to the tenant.

In subparagraph 6 of Paragraph 25, the lease goes on to delineate "real estate taxes," and states that taxes on rents will be included as real estate taxes, if those taxes on rents are a substitute for real estate taxes, as follows:

> Tenant shall at all times be solely responsible for and shall pay before delinquency all municipal, county, state or federal taxes assessed or levied against any leasehold interest hereunder or any personal property of any kind owned, installed or used by Tenant. If at any time during the term of this Lease, a tax or excise on rents or other tax, however described, is levied or assessed against Landlord on account of or measured by, in whole or in part, the rent expressly reserved hereunder (excluding any income, corporate franchise, corporate, estate, inheritance, succession, capital stock, corporate loan, corporate bonus, transfer or profit tax of Landlord) as a substitute, in whole or in part, for taxes assessed or imposed on land and buildings, such tax or excise on rents or other tax shall be included as part of the real property taxes covered hereby, but only to the extent of the amount thereof which is lawfully assessed or imposed as a direct result of Landlord's ownership of this Lease or of the rentals accruing under the Lease.

A plain and uniform reading of subparagraph 6's language, contained within Paragraph 25 of the lease, indicates that Defendants agreed to pay the Plaintiff's rental income taxes only for the portion of those taxes that constitutes "a substitute" "in whole or in part" for standard real property taxes (imposed on land and building). The phrases "a substitute" and "in whole or in part," are crucial to

a correct interpretation and application of this passage, for without them, the provision takes on an entirely different intent and meaning, the antithesis of which goes to the heart of Plaintiff's argument. Further, this provision provides that Defendants will be solely liable for any personal property taxes assessed against them, or the Plaintiff, based on personal property that is owned, installed, or used by Defendants.

Application of this substitution provision controverts Plaintiff's contention that subparagraph 6 requires Defendants to pay any and every "tax or excise on rents or other tax, however described" that "is levied or assessed against Landlord on account of or measured by, in whole or in part, the rent." Rather, the lease requires the Defendants to pay only those taxes or excises measured by rental payments that are a substitute for a tax on the value of the property in question. Further, just as a contract must be read and interpreted as a whole to pay heed to the intentions of the parties, so too must this entire subparagraph be read as a whole, in conjunction with the first subparagraph of Paragraph 25. The first subparagraph is unambiguously devoted to delineating Defendants' obligations as to "real property taxes and assessment." When read in conjunction with subparagraph 6, the differential in intent of obligations of the part of Defendants is apparent. When placed in its proper context, the first sentence of subparagraph 6 does not sanction the right of Plaintiff to reimbursement of its rental tax payments.

Where the first sentence speaks to Defendants' obligations as to taxes assessed against its leasehold interest or personal property, the second sentence enumerates the single circumstance in which the Defendants *would be* obligated to reimburse Plaintiff for payments of a rental tax, *and then*, only as a substitute in whole or in part, for taxes imposed on real property. If the first sentence of subparagraph 6 dictated that Defendants were responsible for paying a myriad of taxes on rents, then the second sentence of subparagraph 6, which requires Defendants to pay one unique type of tax, would be rendered ineffectual and superfluous.

Moreover, the Court finds that the introductory phrase "if at any time" serves to single out and differentiate the stipulated provision that follows from the surrounding subparagraphs, which are devoted to other potential types of tax responsibilities and indebtedness on the part of Defendants. The sentence commencing with "if at any time" refers strictly to taxes devoted to rents, and the Court affords this sentence its ordinary and usual meaning ascribed to its clear and unambiguous terms. These controlling words clarify the terms of this subparagraph, explicating it, and assigning it, its full intent and effect. As such, the Court concludes that the lease unambiguously provides that Plaintiff is entitled to reimbursement *only* for those rental taxes that function as a *substitute, in whole or in part*, for real property taxes.

The Court next addresses the question of whether Delaware's Gross Receipts Tax can be deemed or construed, as a substitute or replacement tax, for a tax on the value of real property. Since the State of Delaware does not have a property tax, it follows, *a priori*, that the Gross Receipts Tax cannot act as its substitute. Basically, the Delaware Gross Receipts Tax could not be a replacement for a property tax because Delaware has never imposed a property tax. Almost one half century ago, in *AT&T Co. v. Everett*, the Delaware Court of Chancery expounded on this very issue.[35] In addition, the Gross Receipts Tax cannot act as a surrogate for a property tax because the two are poles apart. A property tax is predicated on the intrinsic or assessed value of the property that a person owns, whereas the Gross Receipts Tax is predicated on the income an individual receives that is derived from commercial rental payments. As enumerated in 30 *Del. C*. § 2301(e)(6), "[g]ross receipts for commercial lessors as defined in paragraph (6) of subsection (a) of this section shall consist of the rental payment received for a commercial unit located in the State . . . ."[36] Thus, the license fee delineated as

[35] "As I read Chapter 81 of Title 9 *Del.C*., the taxation of real property, … is the prerogative of the counties or other political subdivisions of the State rather than of the State itself . . . . In short, the laws of Delaware provide for the taxation of real property by the counties and other political subdivisions of the State, except as otherwise provided in Chapter 81, and there is no general statutory provision for the taxation of property by the State itself. While the Constitutional provisions governing taxation, namely Article VIII, Section 1, Delaware Constitution, Del.C.Ann., merely provide that '* * * All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws * * *.', and while a State Tax on property, if uniform and otherwise constitutional, could presumably be enacted, Title 30 of *Del.C*., which is a compilation of the various statutes levying taxes for the State, contains no property taxes as such, the taxes there compiled being designed to raise revenue from income, inheritances, the sale of certain commodities and the carrying on of various trades and occupations." *AT&T Co. v. Everett*, 152 A.2d 295, 299 (Del. Ch. 1959).

[36] DEL. CODE ANN. tit. 30, § 2301(e)(6) (1997 & Supp. 2002).

"Gross Receipts Tax" cannot be interpreted as a property tax in any sense, or applicable to the true meaning commonly used to designate a property tax.

Notwithstanding Plaintiff's contention to the contrary, the 1976 amendments to § 2301 that added the provisions for commercial lessors, which at the same time, repealed a portion of the Delaware Realty Transfer Tax, cannot be construed as an act, or an inferred intent, to effectuate the replacement of Gross Receipts Tax on commercial rental payments by a property tax. The Realty Transfer Tax is imposed by the State on the conveyance of real property, and evaluated according to the value of the real property being transferred. A historical review of the Realty Transfer Tax indicates that, after it was enacted in 1965, it excluded commercial leases from the listed taxable types of property transfers until an amendment in 1973. Commercial leases were subject to the Realty Transfer Tax for only three years.[37] Once again, in 1976, the General Assembly excluded commercial leases from the tax. In recognition of the fact that the Realty Transfer Act included commercial leases within its domain for only three years in the forty years since its enactment, there is no support for Plaintiff's contention that the Gross Receipts Tax was a substitute for the Realty Transfer Tax, or somehow

[37] In *Copeland v. Beh*, the Delaware Supreme Court summarized that, "[t]he Delaware Realty Transfer Tax, 30 *Del. C*., chapter 54, as originally enacted in 1965, specifically excluded all leases from the definition of a taxable "document," and did not include a recording compliance provision, as now found in 25 *Del. C*. § 158. *See* 55 Del.Laws, ch. 109 (1965). In 1973, the Realty Transfer Tax law was amended to extend the tax to a lease "for a term of more than 5 years." 59 Del. Laws, ch. 153 (1973)." *Copeland v. Beh*, 1991 WL 134997, at *2 (Del.).

subsumed the Realty Transfer Tax within its constructs. Extending this analysis one step further, the Realty Transfer Tax does not represent, nor is it a stand-in for, a property tax. As

the established laws of real property dictate, a tax on the transfer of real property, is a tax on the sale or disposition of a person's ownership interest. It is a privilege tax. A property tax, on the other hand, is an excise on the ownership or possession of a particular piece of property.

Finally, Plaintiff's argument that the legislative intent and meaning underlying § 2301(e)(6)(a) supports its contention that Defendants have a general obligation to reimburse it for the payment of the Gross Receipts Tax, is misguided. The text of § 2301(e)(6)(a) provides:

> Nothing in this section shall be interpreted to impair a commercial lessor's right under an existing or future lease to require the lessee therein to pay or to reimburse the lessor for the license fees herein imposed as part of the lessee's specified or general obligation to pay or reimburse lessor for gross receipts tax, real estate taxes or other governmental assessments, charges or fees.[38]

Adopted in 1976, this statutory provision does not apply to the four corners of this lease. It is merely a provision bestowing on, and protecting, a lessor's contractual right to require payment of the Gross Receipts Tax. In the instant case, the lease agreement between the parties specifies and qualifies a particular subdivision of

rights and obligations pertaining to rental payment taxes, for which Defendants would reimburse the Plaintiff. Moreover, while the statute does not prejudice Plaintiff's contractual right to collect the Gross Receipts Tax from a lessee, in this instance, the lease, as written, neglects to make any provision for this right. Within the four corners of the lease, Defendants have contracted to reimburse a specified, or a particular portion of, Plaintiff's rental payments excises, only to the extent that these excises are a *substitute* for regular property taxes. Notwithstanding its statutory right, Plaintiff specifically did not require Defendants to reimburse it for Gross Receipts Tax payments. In effect, by the terms of the lease, Plaintiff contracted away any right it was entitled to under § 2301(e)(6)(a) as a commercial lessor. Undeniably, Plaintiff had the right, afforded to it by the statute, to require that its lessee reimburse it for the Gross Receipts Tax. Under the terms of the lease as written, however, it failed to exercise this right. In conclusion, the Court finds that, under the terms of the lease agreement, Defendants are not required to reimburse the Plaintiff for its obligation to pay a Delaware Gross Receipts Tax.

The 2000-2001Real Estate Tax Reimbursement Issue

The second matter of contention between the parties concerns whether the Defendants are responsible for their pro rata share of the New Castle County Real Estate taxes and local school taxes paid by the Plaintiff. Defendants acknowledge

[38] DEL. CODE ANN. tit. 30, § 2301(e)(6)(a) (1997 & Supp. 2002).

that they are responsible for the payment of the "Real Estate Taxes," as enumerated in Paragraph 25 of the lease. The issue disputed by the parties is, which tax years, or portions thereof, are the Defendants obligated to pay the real estate taxes under the lease terms. Defendants maintain that, under the terms of the lease, they are not required to pay Plaintiff's property taxes that were assessed, charged, levied, payable, due, etc. prior to the lease commencement date of November 22, 2000.

On June 28, 2000, Plaintiff was assessed, charged, levied, etc. for New Castle County property taxes totaling $14,365.81, for fiscal year 7/1/2000-6/30/2001. The face of the tax bill indicated that it was due and payable upon receipt, taxpayers should mail their payments by 9/25/2000, and statutory penalties would apply if payment was not received by 10/02/2000. Plaintiff also received a tax bill, dated July 24, 2000, for the Local School District Taxes in the amount of $30,990.39 for fiscal year 7/1/2000-6/30/2001. The face of this tax bill indicated that it was due and payable upon receipt, taxpayers should mail their payments by 9/25/2000, and statutory penalties would apply if payment was not received by 10/02/2000.

One year later, in July 2001, Defendants received a pro rated tax bill in the amount of $14,359.85, comprised of their respective pro rata responsibilities owing for the two property taxes, in connection with Defendants' occupancy of the

premises from November 22, 2000 through June 30, 2001. Defendants submit that this amount is in error because the two underlying property tax bills were assessed, levied, due, and payable, prior to the commencement of the lease. Furthermore, pursuant to the terms of the lease, Defendants argue that the tax bill was not submitted for payment to the Defendants in the appropriate manner.

Defendants remitted $2,591.89 to Plaintiff on November 30, 2001, representing the amount of New Castle County property tax for fiscal year 2000-2001 assessed to Plaintiff, pro-rated for the number of days in calendar year 2000 that Defendants occupied the demised premises. In accordance with this preliminary payment, Defendants later contended that they mistakenly paid this amount to the Plaintiff because the lease does not obligate them to be responsible for Plaintiff's property taxes, which were payable, due, assessed, etc., prior to the commencement date of the lease. Defendants seek to recoup this amount in their counterclaim.

The focal point of the parties' dispute hinges on the pertinent language contained, once again, in the lease provision, Paragraph 25. Paragraph 25 of the lease provides that, "[t]enant shall pay all real estate taxes and all installments of assessments (collectively, the "Taxes") payable with respect to the Premises during the Lease Term promptly as the same shall become due . . . . Such payment shall be proportionately adjusted during the first and the last years of the term hereof."

Pursuant to the defined terms of the lease, the "Lease Term" is deemed to have commenced on "the date (the "Commencement Date") which is the earlier of (i) the "Tenancy Date," as that term is hereinafter defined, or (ii) the date Tenant opens for business to the public at the Premises." The lease goes on to define the term "Tenancy Date" as, "[t]he ninetieth (90^{th}) day after Landlord's architect certifies in writing that the Premises are . . . available for occupancy by Tenant; . . . ." In the instant case, the Lease Term commenced on November 22, 2000, in accordance with Defendants opening for business to the public.

In recognition of Defendants' payment of $2,591.89 to Plaintiff on November 30, 2001 (pro rated portion owed by Defendants for the time period November 22, 2000 through December 31, 2000), Plaintiff submits that it is currently owed the balance of $11,767.96 for the remaining real property taxes paid for the tax year 2000-2001. This amount is the pro rated portion owed by Defendants for the time period January 1, 2001 through June 30, 2001.

The Court finds that a plain, uninhibited, reading of the lease terms and conditions result in only one conclusion. It is unconditionally clear that the lease provides for Defendants' obligation for their pro rata share of the real estate taxes for the 2000-2001 tax year, which must include the entire designated time period for which the Defendants occupied the demised premises, despite Defendants' contention to the contrary.

Whether read and interpreted in the fragmented context of its relationship to its subdivided, enumerated subparagraphs, or interpreted and integrated as a whole, in contemplation of its self-contained terms and obligations, Paragraph 25 directs the Defendants to pay "all real estate taxes" and "all installments of assessments" "payable" with respect to the premises during the "Lease Term" as "shall become due." Quite simply, Defendants opened for business on November 22, 2000, and the Lease Term, signified by the Commencement Date, began with the opening rings of Defendants' cash registers. The second sentence of Paragraph 25 is the conclusive language that defeats Defendants' argument that they are not responsible for the real property taxes from November 20, 2000 through June 30, 2001. Contained within this sentence, the phrase, "such payment shall be *proportionately adjusted during the first and the last years of the term*," authorizes the Plaintiff, as landlord, to charge the Defendants their pro rata share of the property taxes, adjusted to compensate for the split period for the fiscal tax year in which the lease has commenced. Since few commercial leases commence on the same exact date as the incumbent, fiscal property tax year, it stands to reason that once the fiscal tax year concludes and/or landlord receives its bill for the related taxes, a tenant's obligation also becomes due for its pro rata share for the time period it physically occupied the leased premises, whether the property taxes were actually assessed, or due, or payable, etc., before the actual lease term commenced.

That is the undeniable, common sense, provision for which Plaintiff contracted in the second sentence of Paragraph 25. Justifiably, the lease also provided that the Defendants would not be responsible for the real estate taxes for those time periods which were not included, or part of, the lease term. Simply put, the lease would not make allowances for those amounts "owed during the first and last years of the lease term," if the Plaintiff, as an experienced commercial lessor, did not expect the Defendants to be responsible for their pro rata share in the first year of the lease term, as well as, in the last year of the lease term.

Defendants' claim that they are not obligated under the lease for these specific real estate taxes because the tax bills were either assessed, due, payable, and or/paid prior to November 22, 2000, represents an illogical, unsupported rationalization. Defendants are a national retail chain, accustomed to leasing vast amounts of retail spaces all over the country. As such, they possess the experience and skill generally exercised in the negotiation and formulation of contractual relationships with retail mall and shopping center lessors. Therefore, the part-and-parcel procedures of the lease negotiation process are not foreign to them. As such, Defendants cannot realistically contend that they are absolved from paying these real estate taxes by cleverly massaging the words and/or terms of the lease to their benefit. Further, Defendants' claim that the Plaintiff "bargained out of any obligation for property taxes assessed, levied, payable, due, etc." pursuant to the

lease provision contained in subparagraph 5 of Paragraph 25, is unfounded, and in contravention to the rules of general contract interpretation. The relevant words of the provision provide that, "[n]otwithstanding anything to the contrary contained herein, the definition of Taxes shall not include, and Tenant shall have no obligation to pay, any assessment levied, pending or assessed prior to the Commencement Date." This provision does not negate the more significant and controlling "Real Estate Taxes" provision embedded in the first two sentences of Paragraph 25, as explained above.

Since contracts are to be interpreted as a whole so as to give effect to the intention of the parties, and since a contract is ambiguous only when the provisions are reasonably or fairly susceptible of different interpretations or may have two or more different meanings, the true test becomes, not what the parties intended, but what a reasonable person in the same position of the parties would have thought it meant. It is unmistakable that the lease provision contained in subparagraph 5 of Paragraph 25 as enumerated above, beginning with the word "notwithstanding," is a general, catchall, provision incorporated into the next-to-last subparagraph of Paragraph 25. It serves the perfunctory purpose of acting as a "safety-net," to protect the Defendants from any potential charges incurred by the Plaintiff during the pre-commencement period of the lease term, i.e., work performed on the leased premises prior to the commencement date or to the initial construction of the

shopping center. No reasonable person standing in the shoes of the parties at the time the lease was signed, could interpret this subparagraph to negate the over all intent and meaning of a parties' financial obligations for real estate taxes commensurate with one's occupation of a leased premises.

Based on these tenets of contract interpretation, and the inferred experience, knowledge and savoir-faire in commercial lease matters that the Court has accorded to the parties, the Defendants' interpretation of their real estate tax obligations for 2000-2001 is commercially unreasonable. The Defendants' arguments that they are not responsible for these taxes because Plaintiff paid them prior to the lease term, and/or that they were not afforded the opportunity to contest the charged amount of property taxes, are fallacious. As a commercial lessor, Plaintiff is responsible for the real property taxes on its real property, and naturally, adopts the normal business practice of paying the taxes as they come due. Acceptance of Defendants' line of reasoning would mean that, in order for the Plaintiff to collect the taxes for the seven and one-half months that the Defendants occupied the demised premises, Plaintiff would have had to allow itself to become in arrears on these taxes, waiting until June 30, 2001 to seek payment from Defendants. Not only is this unsound business practice, it is commercially unreasonable.

Finally, although Defendants contend that they may not have been able to contest the assessment of the real estate taxes pursuant to the terms of the lease, Defendants did not propound, nor did they present any identifiable basis to contest the real estate tax assessment. Thus, in this instance as well, Defendants' argument rings hollow.

In conclusion, the Court finds that the Gross Receipts Tax is not a substitute for a state-imposed property tax because it cannot replace a non-existent tax. Also, the Gross Receipts Tax, conceived as a privilege tax, is unique and distinguishable from a property tax, such that it cannot act as its substitute. Nor is the Gross Receipts Tax a substitute for The Realty Transfer Tax. For these reasons, in the Court's judgment, Defendants are not responsible for the payment of the Gross Receipts Tax under the terms and conditions of the lease agreement. Therefore, Plaintiff is not entitled to summary judgment on this issue, nor the $13,309.32 Gross Receipts Tax reimbursement from the Defendants.

With respect to the real estate property taxes due and owing for the fiscal tax year 2000-2001, in relation to Defendants' occupancy of the leased premised from November 20, 2000 through June 31, 2001, pursuant to the terms and conditions of the lease agreement, the Court holds that Defendants are obligated to reimburse the Plaintiff $11,767.96 for these taxes. Therefore, Defendants are not entitled to summary judgment on this issue. Accordingly, Defendants are responsible for

payment to Plaintiff of the remaining balance of $11,767.96, for the related real property taxes already paid by the Plaintiff. Additionally, Defendants are not entitled to reimbursement of $2,591.89 from Plaintiff for the real estate property taxes covering the period November 22, 2000 through December 31, 2000, as this amount was properly paid.

Conclusion

For all the foregoing reasons, Defendants' Motion for Summary Judgment on Plaintiff's complaint is **GRANTED, IN PART,** with respect to the issue of Defendants not being obligated, pursuant to the terms and conditions of the lease, to reimburse the Plaintiff for the Delaware Gross Receipts Tax. Defendants' Motion for Summary Judgment is **DENIED, IN PART,** with respect to the issue that it is not obligated to reimburse Plaintiff for the 2000-2001 real estate property taxes already paid by Plaintiff. Defendants are obligated for these taxes. Additionally, Defendants' counterclaim seeking reimbursement of $2,591.89 from Plaintiff is **DISMISSED**.

Plaintiff's Cross Motion for Summary Judgment on its complaint and counterclaim is **DENIED, IN PART,** with respect to the issue of Defendants being obligated, pursuant to the terms and conditions of the lease, to reimburse the Plaintiff for the Delaware Gross Receipts Tax. Defendants are not obligated to reimburse the Plaintiff for the Delaware Gross Receipts Tax. Plaintiff's Motion for

Summary Judgment is **GRANTED, IN PART,** with respect to the issue that the Defendants are obligated to reimburse Plaintiff for the 2000-2001 real estate property taxes already paid by Plaintiff.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Daniel R. Losco, Esquire
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Prothonotary