SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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May 31, 2006

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RE: Emmanuel S. Troumouhis v. State of Delaware, Department of Transportation
C.A. No. 04C-01-104 WCC

Submitted: February 24, 2006
Decided: May 31, 2006

On Defendant's Motion for Summary Judgment. GRANTED.
On Plaintiff's Motion for Reargument. DENIED.

Dear Counsel:

Before the Court is the remaining issue to be decided with respect to the State of Delaware, Department of Transportation's ("Defendant" or "DelDOT") Motion for Summary Judgment (the "DelDOT Motion") and Emmanuel S. Troumouhis' ("Plaintiff" or "Mr. Troumouhis") Motion for Reargument (the "Motion for Reargument"). The Court has delayed issuing this final opinion in the hope that the opinion of this Court issued on October 26, 2005 would have provided a catalyst to the parties to seek a fair and equitable resolution of this dispute. In addition, there

has recently been the appointment of a new Secretary of Transportation and news reports of significant shortfalls in highway funds normally available to DelDOT which potentially would have an impact on the practicality of building a transportation hub at this site. It was thought that perhaps this changing landscape as well as the passage of time would have cooled tempers and caused the parties' positions to become more flexible. In spite of the Court's numerous attempts to bring some reason and common sense to this litigation, it is clear that those attempts have failed and a compromise in this litigation will not occur. As such, I will simply have to rule on the pending motions and the parties will have no one to blame but themselves for the positions they find themselves in thereafter. The Court would still encourage discussions and a realistic evaluation by all sides as to whether there is a more economically beneficial path to follow in attempting to resolve this dispute. It appears to the Court that the attorneys' fees associated with this continuing litigation are beginning to nearly outpace what the litigation is worth, and clearly this matter should have never reached this litigation stage. However, upon review of the record and briefs filed in this matter, this Court hereby grants DelDOT's Motion and denies the Motion for Reargument.

PLAINTIFF'S MOTION FOR REARGUMENT[1]

Mr. Troumouhis' Motion for Reargument, filed pursuant to Superior Court Civil Rule 59 ("Rule 59"), seeks reargument with respect to the opinion issued by this Court on October 26, 2005 (" Opinion"). A motion for reargument is the correct device to allow a court to correct any mistakes, prior to an appeal, which may have been made.[2] To prevail on a motion for reargument, the proponent must show the Court has "overlooked a controlling precedent or legal principles, or [that] the Court has misapprehended the law or facts such as would affect the outcome of the decision."[3] Mr. Troumouhis's motion includes several arguments for the Court to analyze using this standard.

Mr. Troumouhis argues first that the Opinion failed to address certain issues with respect to inverse condemnation, namely judicial estoppel and the doctrine of

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[1]The facts of the case are set forth in the Court's Opinion of October 26, 2005 and will not be repeated here.

[2]*Kovach v. Brandywine Innkeepers Ltd. P'ship*, 2001 WL 1198944 (Del. Super. Ct.), at *1 (citing *Hessler v. Farrell*, 260 A.2d 701, 702 (Del. 1969)).

[3]*Id.*; *see also Murphy v. State Farm Ins. Co.*, 1997 WL 528252 (Del. Super. Ct.).

the law of the case, and that these principles would have rendered a different conclusion. Judicial estoppel, as an equitable doctrine, prevents a party from changing its position to a contrary position previously taken which the Court accepted as grounds for its ruling.[4] This simply has not occurred here. To the disappointment of the Court, the parties' positions have remained rigid and uncompromising.

The law of the case doctrine asserts that, since a decision becomes the law of that case once addressed in a procedurally appropriate manner by the court, re-litigation of an issue previously decided by a court is inappropriate unless there is a compelling reason to do so.[5] For this doctrine to apply to the present case, the Court must have previously issued a ruling that resolved the dispute between Sections 24 and 29 of the Lease. While the Court agrees that it indicated at the July 20, 2005 hearing that the Plaintiff had "won" in that he still was operating his restaurant at the DelDOT location and the Court had not provided a mechanism to remove him, there was nothing to suggest that it had definitively ruled which provision of the Lease controlled. The Court's statements simply reflect the reality of the situation that, at that moment, Mr. Troumouhis continued to have a right to operate his restaurant at the location since there had been no judicial determination by the Court or jury of the rights of the parties under the Lease provisions.

The problem with Plaintiff's argument regarding the law of the case doctrine is that, as the Court explained in its Opinion of October 26, 2005, when the Court was considering the motions for summary judgment, it had not focused nor had the parties significantly argued that the inconsistencies and dispute between Sections 24 and 29 of the Lease were solely an issue of law for the Court to decide. While the Court admits that this was an unfortunate oversight it should have recognized, there clearly was no legal analysis by the Court regarding its responsibility to determine the priority of these contractual provisions. This is evidenced by the Court's letter of June 8, 2005, shortly after the argument of May 23, 2005, in which the Court advised counsel that "during the Court proceeding the Court found that there was a conflict between Sections 24 and 29 of the Lease and this dispute would not allow the Court to grant summary judgment regarding defendant's declaratory judgment count."

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[4] *Amaysing Techs. Corp. v. Cyberair Commc'ns., Inc.*, 2005 WL 578972 (Del. Ch.), at * 4. (citations omitted).

[5] *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del.Ch. 2003) (citations omitted).

Obviously, if the Court believed it had ruled that Section 29 was the controlling provision of the contract, it would not have indicated there was a continuing conflict between these provisions. In addition, to the extent Plaintiff's counsel believes it was misled, the Court, at the request of Plaintiff's counsel, specifically indicated that it was vacating any other rulings made at the hearing except finding (a) that a dispute remained between Sections 24 and 29 of the Lease and (b) the Court was not accepting the novel argument with respect to condemnation that the Plaintiff was making regarding Count I of its amended complaint. To believe the dispute between Sections 24 and 29 had been resolved would be an unfair characterization of the Court's decision at that point. Finally, after raising the concern with counsel that it had not appropriately focused on the issue it was being asked to resolve, the Court gave Plaintiff an opportunity to file additional submissions on this issue. While the Court will take some of the blame here for not perfecting a clear record, this is not a game of "I got you" where the Court has no ability to correct its obvious misconstruing of counsels' argument, and where it has taken reasonable steps to avoid prejudice to the parties by allowing additional briefing in the area. The Court finds, under these circumstances, the doctrine of the law of the case simply has no application to prevent the Court from issuing its prior Opinion.

Finally, as to the other issues raised in the Plaintiff's motion for reargument, the Court has again reviewed its Opinion of October 26, 2005 and finds it has not overlooked a controlling precedent or legal principle, nor has it misapprehended the law or facts which would affect the outcome of that decision. The Court believes that the Opinion previously issued is appropriate and is not convinced by the Plaintiff's argument that another conclusion is warranted. As such, the Plaintiff's Motion for Reargument is hereby denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law.[6] In considering such a motion, the court must evaluate the facts in the light

[6]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

most favorable to the non-moving party.[7] Summary judgment will not be granted when the record reasonably indicates a material fact is in dispute or if a more thorough inquiry into the facts is appropriate to clarify the application of law to the circumstances.[8]

As a result of the Court's prior Opinion, the only remaining count of the amended complaint is Count V, which asserts a breach of contract and requests a declaratory judgment. The issue surrounding this count involves the interplay between Sections 24 and 29 of the Lease. DelDOT argues that Section 24 is enforceable as written and it provides DelDOT the right to terminate the Lease after providing Mr. Troumouhis six months notice which was done prior to the filing of this lawsuit. Mr. Troumouhis contends that Section 29, which incorporates the Landlord-Tenant Code into the Lease, controls the legal relationship of the parties and should take priority over other provisions of the Lease that may be in conflict. If Section 29 is enforced, DelDOT does not have the right to terminate the Lease prematurely because Section 5106(c) of the Landlord-Tenant Code explicitly prohibits such action without the tenant's consent. It is the interpretation of the conflicting provisions of the Lease that remain for the Court to rule upon. Interpretation of a contract is a question of law, and the Court, therefore, determines the terms and meaning agreed upon by the parties.[9]

(A) Ambiguity of Sections 24 and 29

To interpret a contract, the Court must first determine if an ambiguity exists within the contract. The Court should review the entire contract, and ambiguity can only exist when the terms in contention are "reasonably or fairly susceptible of different interpretations" or if the terms may have two or more meanings.[10]

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[7] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-9 (Del. 1962).

[9] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001) (citing *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. Super. Ct. 1997); *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.,* 616 A.2d 1192, 1195 (Del. Super. Ct. 1992)).

[10] *Rhone-Poulenc*, 616 A.2d at 1196 (citing *Steigler v. Ins. Co. of North Am.*, 384 A.2d 398, 401 (Del. Super. Ct. 1978)) ("[t]he true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it

The remaining dispute between the parties relates to the interaction of Sections 24 and 29 of the Lease and the suggested inconsistency between these provisions. Section 24, titled "Change in Ownership," states:

> Tenants agrees that in the event that the Premises is sold, or in the event of any change of legal title or equitable ownership, this lease, at the option of the Landlord, shall terminate absolutely upon six (6) months written notice to the Tenant, anything contained herein to the contrary notwithstanding or if said option is not exercised, the Tenant agrees that all obligation herein undertaken by the Landlord, including but not limited to the obligation for the return of any security deposit paid hereunder, shall be transferred to such purchaser or assignee, and in such event all of Landlord's obligations shall terminate and landlord shall be released and relieved from all liability and responsibility to Tenant hereunder and Tenant shall look solely to such purchaser or assignee for the performance of said obligations or for the enforcement thereof. Each purchaser or assignee shall in turn have like privileges of sale, assignment and release.

Section 29, titled "Summary of Landlord-Tenant Code," states:

> Tenant, in executing this rental agreement, hereby acknowledges receipt of a summary of the Landlord-Tenant Code prepared by the Attorney General of the State of Delaware, said Summary of which is attach hereto and made a part hereof as Exhibit E. It is agreed by the Landlord and Tenant that the rights, obligation and remedies contained in this Code are hereby incorporated by reference into this rental agreement, and shall be binding upon the parties. Landlord agrees to keep copies of the entire Landlord-Tenant Code at the office of Landlord and to make them available for consultation by Tenant during Landlord's normal office hours.

After analyzing the above provisions in conjunction with the remainder of the Lease, and excluding any extrinsic evidence related to the Lease, it appears

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meant."); *see also O'Brien*, 785 A.2d at 286, 289; Williston on Contracts § 30:4 (A mere failure to define a term or include a more definite intent of the parties does not itself create ambiguity.).

reasonable that either section could be enforced to the detriment of the other. In simple terms, Section 24 advises the parties of termination rights in the event of a change in ownership by the landlord. These termination rights conflict with the Landlord-Tenant Code provisions for early termination.[11] Since terms or provisions together can be reasonably interpreted to mean two or more different things, and because enforcement of each would result in a different outcome, the two sections are ambiguous by definition. However, while they are ambiguous terms, Sections 24 and 29 can be interpreted by this Court without further evidence from the parties since both sections contain terms which are "plain and clear on its face,"[12] despite conflicting with each other, and the Court believes the parties' intent can be reasonably ascertained therefrom.

(B) Interpretation of the Lease

To interpret a contract in general, this Court must follow precedent and well-settled contract principles. First, contract terms should not be read to be illusory or meaningless.[13] All provisions within the contract must be given effect so the contract is interpreted as a whole.[14] Since no passage should be read in isolation, meanings within certain portions of a contract cannot control the entire contract if the meaning is counter to the contract's overall scheme.[15] If more than one interpretation of a lease is possible, and one of the ways discounts a provision and the other way harmonizes

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[11] The Landlord-Tenant Code does not apply to commercial leases unless the lease expressly states it applies, and here Section 29 states the Landlord-Tenant Code is applicable to the Lease.

[12] *O'Brien*, 785 A.2d at 289.

[13] *McKnight v. USAA Casualty Ins. Co.*, 871 A.2d 446, 449 (Del. Super. Ct. 2005); *see also O'Brien*, 785 A.2d at 287.

[14] *Id. See also O'Brien*, 785 A.2d at 287; *Elliott Assoc. v. Bio-Response, Inc.*, 1989 WL 55070, at *3 (Del.Ch.).

[15] *E.I. du Pont de Nemours and Co. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985); *see also McKnight*, 871 A.2d at 449.

the provisions so that both are given effect, the court should use the latter construction.[16]

The Court finds there is a reasonable and logical harmonizing that can occur with the clauses so that both sections have meaning. By the terms of Section 24, it only becomes applicable in the event the landlord conveyed its interest to another party. This is a reasonable and logical condition for the landlord, since it provides maximum flexibility in how it utilizes the property and minimizes the adverse effect on the property value if a decision is made to sell it to another party. Obviously, any limitation on the use of the property will adversely affect its value. By placing a six month limitation within the Lease, this effect is minimized while at the same time providing a reasonable time for the tenant to react to changing circumstances. To find that the Landlord-Tenant Code provision found in Section 29 has priority even when a transfer to a new owner occurs would make Section 24 meaningless. On the other hand, to limit Section 24's applicability to only the circumstances of a transfer to a new party, and allowing the remaining relationship between the parties to be controlled by the Landlord-Tenant Code, allows both sections to have meaning. The Farmers could not have terminated the Lease without complying with the Landlord-Tenant Code unless they transferred the property. Section 24 controls the conveyance to a third party, while Section 29 controls the ongoing relationship between owner and tenant.

Next, if provisions are inconsistent, the more specific terms should be given greater weight. A specifically written clause is presumably more closely linked to and better expresses the parties' intention than a general or more broad clause.[17] Consequently, Section 24 should be enforced because it is a more specifically written clause as compared to Section 29. Section 24 specifically states that, in the event of a change of title or ownership, ". . . the Landlord, shall terminate absolutely upon six (6) months written notice to the Tenant, **anything contained herein to the contrary notwithstanding**. . . ." Section 29 does not state with specificity exactly what the

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[16]*Roffman v. Wilmington Housing Auth.,* 179 A.2d 99, 101 (Del. 1962). (The Court harmonized two provisions of a lease by interpreting a waiver of a covenant within the lease only with respect to claims against the lessor, and not also a waiver against the owner. To do contrary would allow the second clause to be void, and the court surmised harmony would best reflect the parties' intent.).

[17]*Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. Super. Ct. 1960) ("Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.").

proper actions would be in the event the land is conveyed to a new owner and the landlord would like to terminate the lease early. Still further, Section 24 specifically states that any other clause which may be contradictory to Section 24, presumably a clause such as Section 29, will not trump Section 24. It appears from this language, and from the specificity of the language within Section 24, that the parties intended Section 24 to prevail in the situation before this Court.

The next rule of contractual interpretation is that contracts should be read to construe any ambiguous language in the favor of the non-drafting party.[18] The parties to this Lease were Mr. Troumouhis and the Farmers. DelDOT was not a party and did not participate in the drafting of its provisions. While the Court believes there is no dispute that the Lease was prepared by counsel for the Farmers, it is not logical or fair that DelDOT should now be considered the "drafting" party simply because they have purchased the land and assumed the Lease. This factor is simply not applicable to the facts of this case.

Finally, Mr. Troumouhis argues the Lease is valid due to the Court's previous ruling coupled with DelDOT's subsequent acceptance of rent from Mr. Troumouhis. A non-breaching party may not accept the benefits of a contract, and at the same time, declare the contract unenforceable.[19] He argues that by accepting rent from Mr. Troumouhis, DelDOT has in effect adopted his interpretation of the Lease. DelDOT has argued it has not breached the Lease and only recently began accepting rent when it appeared that the conflicting provisions of the Lease were not going to be resolved by the Court. DelDOT had consistently taken the position that they had the right to terminate the Lease and refused until recently to compromise that position by taking rent payments from the Plaintiff. It appears to the Court that, for nearly 17 months, Mr. Troumouhis operated his business without the payment of rent. Only after the hearing on May 23, 2005, where the Court refused to resolve the conflict between Sections 24 and 29, did the Defendant eventually begin accepting some rental payments. This circumstance is an unfortunate consequence of the Court's failure to again recognize it's obligation to resolve the contractual dispute, and where the

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[18]*Mastrobuono v. Shearson Lehman Hutton, Inc.,* 115 S.Ct. 1219 (1995).

[19]*DeMarie v. Neff*, 2005 WL 89403 (Del. Ch.) (citing *SLMSoft.com, Inc. v. Cross Country Bank*, 2003 WL 1769770 (Del. Super. Ct.)) (A contract of sale of property was void after the buyer did not provide a required deposit, and the seller enforced its right to then void the sale contract in lieu of another buyer.).

parties were clearly confused as to what appropriate avenue they should follow based upon the Court's comments. In spite of this confusion, DelDOT has consistently taken the position that the Lease was valid but that it had a right to terminate the Lease early pursuant to Section 24. Under the unusual circumstances here, the Court cannot find acceptance of some rental payments as an acquiescence by the Defendant of the Plaintiff's legal positions. Nothing could be further from the truth. In addition, Mr. Troumouhis does not come to the Court on this argument with clean hands, as he operated his business for a significant period of time without the payment of rent which, to the Court's knowledge, DelDOT has not received compensation. As such, the Court does not find the acceptance of rent payment significant to the fair resolution of this dispute.

(C) Conclusion

When the Court considers all of these factors together, it finds that a reasonable reading of the provisions of the Lease would allow DelDOT the right to terminate the Lease under Section 24 in spite of Section 29. Section 24 is more precise, more specifically aligned with the factual relationship between the parties and appears to specifically control the continuation of the Lease when the property is transferred to another party. The "catch all" provision of Section 29, an unusual provision for a commercial lease, does not invalidate what appears to be the clear intent of the parties to allow for termination if the property ever is transferred. As such, DelDOT can use the provision to appropriately terminate the Lease, and DelDOT's Motion for Summary Judgment is hereby granted.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Aimee Bowers, Case Manager