SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

October 16, 2006

John A. Sergovic, Esquire
Sergovic & Ellis, P.A.
9 North Front Street
P.O. Box 875
Georgetown, Delaware 19947

Peter B. Ladig, Esquire
The Bayard Firm
222 Delaware Avenue; Suite 900
P.O. Box 25130
Wilmington, Delaware 19899

RE: *Rehoboth Mall Limited Partnership v. Eckerd Corp., et al.*
C.A. No. 05C-12-025

DATE SUBMITTED: September 6, 2006
DATE DECIDED: October 16, 2006

Dear Counsel:

Pending before the Court are the Parties' Cross-Motions for Summary Judgment. The Court denies Plaintiff's Motion for Summary Judgment and grants Defendants' Motion for Summary Judgment for the reasons set forth herein.

**Statement of the Case**

Rehoboth Mall Limited Partnership ("RMLP") filed the Complaint in this matter on December 22, 2005, seeking a declaratory judgment determining the rights and obligations of the Parties under a Lease Agreement relating to certain real property located in Rehoboth Beach, Delaware. RMLP specifically asks the Court to find that the Lease Agreement terminated on March 31, 2006, and that the tenant thereunder has no further renewal rights under the Lease Agreement.

Defendants, Eckerd Corporation ("Eckerd"), and The Jean Coutu Group (PJC) USA, Inc. ("JCG"), timely answered the Complaint and filed a Counterclaim whereby Eckerd seeks a declaration that it properly exercised its first option to extend the Lease Agreement for five years, as contemplated by the Lease Agreement, as well as a finding that RMLP's actions were in bad faith and designed to frustrate the purpose of the Lease Agreement. Plaintiff answered the counterclaim denying that Defendants were entitled to such relief.

Defendants filed a Motion for Summary Judgment on March 20, 2006, and Plaintiff filed a Motion for Summary Judgment on April 26, 2006. The motions have been fully briefed and the Parties agree that the central issue in the case is whether Eckerd properly exercised the renewal option contained in the Lease Agreement.

The Court finds Eckerd properly exercised the renewal option and that the Lease Agreement has been renewed through March 31, 2011.

**Statement of the Facts**

On or about October 15, 1984, RMLP entered into an Indenture of Lease Agreement ("Lease Agreement") with the J.C.Penny Company, Inc. ("J.C. Penny") whereby J.C. Penny was granted a leasehold interest in a certain portion of the Rehoboth Mall Shopping Center ("Rehoboth Mall"). The Lease Agreement was for a term of twenty years and contained four successive options to extend the term of the Lease. Specifically, the Lease Agreement provided:

> OPTIONS TO EXTEND: Tenant shall have four (4) successive options to extend the term of this lease from the date upon which it would otherwise expire upon the same terms and conditions as those herein specified for four (4) separate additional periods of five (5) years each. If Tenant elects to exercise any of said options, it shall do so by giving Landlord written notice of such election at least six (6) months before the beginning of the additional period for which the term hereof is to be extended by the exercise of such option. If Tenant gives such notice, the term of this lease shall

be automatically extended for the additional period of years covered by the option so exercised without execution of an extension or renewal lease.

The initial twenty-year term was to expire, by agreement of the parties, on March 31, 2006. J.C. Penny subsequently acquired ownership of Eckerd and assigned its rights and obligations under the Lease Agreement to Eckerd. The specific details of this assignment are not known and not at issue but, in any event, RMLP began accepting rent payments from Eckerd and thereafter specifically contracted with Eckerd to amend the Lease Agreement.[1] In the intervening years, J.C. Penny sold Eckerd and JCG acquired Eckerd. Nevertheless, Eckerd remains a distinct entity and the tenant under the Lease Agreement.

By way of letter dated September 21, 2005, Eckerd Vice President Peter E. Schmitz attempted to exercise the first five-year option provided for under the Lease Agreement. The text of this letter (hereinafter, the "Election Notice") referenced the specific Eckerd store and the store's location in Rehoboth Beach but was signed simply "Peter Schmitz, Vice President". The letterhead upon which the Election Notice was written listed two pharmacies: "Brooks Pharmacy" in the upper left hand corner and "'New' Eckerd Pharmacy" in the upper right hand corner. The letter was addressed to "Rehoboth Mall G.P. Limited Partnerhip c/o The Cordish Comp" at 601 East Pratt Street, Suite 600; Baltimore, Maryland 21202 ("the Pratt Street Address"). The text of the letter read:

Re: Eckerd Store ##6291R
4493 Highway 1, Rehoboth Beach, DE

Dear Landlord:

---

[1] The Parties amended the Lease Agreement on several occasions but the content of the amendments is not at issue. The amendments primarily dealt with the relocation of Eckerd's store to a different location within Rehoboth Mall.

> In accordance with the terms of the lease for the above referenced location, we do hereby elect to exercise one (1) (one) 5 (five)-year option, extending the termination date of the lease to April 1, 2011.
>
> Although the effectiveness of this letter to you shall not be invalid if you do not respond as requested below, as a courtesy to us we would appreciate your acknowledgment of your receipt of this letter as indicated on the enclosed copy of this letter and returning one copy of this letter to the attention of **Patricia Rose, Eckerd Corporation, Real Estate Department, 50 Service Avenue, Warwick, RI 02886** so that we can maintain accurate records in our files.
>
> Thank you for your consideration in this matter.
>
> Sincerely,
>
> Peter Schmitz
> Vice President

(Emphasis in original.) The Election Notice was acknowledged by return receipt, which was signed for by the front desk employee of the Cordish Company on September 26, 2005. Glenn Weinberg, a representative of RMLP, personally received the Election Notice prior to October 1, 2005.

**Motions for Summary Judgment**
**Standard of Review**

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v.. Sizemore,* 405 A.2d 679, 680 (Del. 1979). Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). If, after discovery, the non-

moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted. *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp., supra.* If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate. *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

In the event that parties file cross-motions for summary judgment, "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective motions." *Browning-Ferris v. Rockford Enters.,* 642 A.2d 820, 823 (Del. Super. 1993); *see also* Super. Ct. Civ. R. 56(h).

**Discussion**

RMLP's arguments may be summarized as follows: the Election Notice was legally deficient because (a) the notice was received by the landlord's general partner, instead of the landlord named in the Lease Agreement, and, thus, the landlord did not receive notice prior to October 1, 2005, and (b) the recipient of the Extension Notice was unable to tell on whose behalf the Election Notice was sent and, thus, the Election Notice was not exercised by the tenant of record. These arguments will be considered in turn.

A. The Election Notice was improperly received by a general partner of RMLP.

The Notice paragraph of the Lease Agreement reads, in relevant part, as follows:

> NOTICES: Whenever any notice is required or permitted hereunder, such notice shall be in writing. . . . Until Tenant receives other instructions from Landlord, all notices by Tenant to Landlord shall be deemed to have been duly given if sent by registered or certified mail to any one of the parties named herein as Landlord at such party's address as set forth in the paragraph hereof captioned "PARTIES".

Pursuant to the Lease Agreement, the landlord is defined as "Rehoboth Mall Limited Partnership, a Maryland limited partnership, with a mailing address of Rockland Grist Mill, Old Court & Falls Roads, Brooklandville, Maryland 21002". Although the Lease Agreement identifies RMLP's address as being located in Brooklandville, Maryland, at some point Eckerd was directed to send communication to RMLP at the Pratt Street Address. In fact, RMLP attaches examples of communication addressed to RMLP at the Pratt Street Address to its Complaint as an example of model communication. In addition, Eckerd was instructed to direct all rent payments to RMLP's general partner, Rehoboth Mall G.P. Limited Partnership ("RMGPLP"), at the Pratt Street Address by way of letter dated October 15, 1992.

In September of 2005, Patricia Rose, Director of Real Estate Administration for Eckerd, prepared the Election Notice, a letter purporting to notify RMLP that Eckerd was exercising its option to extend the Lease Agreement for five years. The letter was addressed to RMGPLP and sent on September 21, 2005, by certified mail. The Election Notice was received at the Pratt Street Address on September 26, 2005, and signed for by the front desk employee for the Cordish Group. Mr. Glenn Weinberg, a representative of RMLP, physically received the Election Notice prior to October 1, 2005.

The Court finds that the Election Notice was effectively delivered to RMLP on the date when it was delivered to RMGPLP, a general partner of RMLP.[2] A basic tenant of partnership law is that each general partner is considered an agent of all the partners and notice to one partner is notice to

[2] RMLP argues that the Election Notice was not effective upon mailing because it was "misaddressed". The Court declines to consider this argument because it finds that the uncontested facts show that RMGPLP received the letter prior to the magic date of October 1, 2005.

all partners. *Walthall v. United States*, 911 F. Supp. 1275, 1281-82 (D. Alaska 1995). This principle is embodied in the Revised Uniform Partnership Act, which Delaware has adopted: "A partner's knowledge, notice or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner." 6 *Del. C.* §15-102.

As a matter of law, the timely delivery of the Election Notice to a general partner of RMLP at its business address satisfies the Lease Agreement requirement that the Election Notice be delivered to the RMLP.[3]

B. The Election Notice was improperly sent in that it was not clearly designated as having been sent by the Tenant.

RMLP argues that the Election Notice was not clearly identified as having been sent by Eckerd ("the authority of the author . . . is inherently suspect") and, thus, Eckerd failed to exercise the renewal option.

The issue before the Court is one of first impression in Delaware. However, similar facts have been considered by courts in other jurisdictions. The rationale used by the United States Bankruptcy Court for the Southern District of New York in *Ames Department Stores, Inc. v. Ames Realty II, Inc.*, is consistent with Delaware contract law and is useful as a framework for analysis in the case at bar. *See Ames Department Stores, Inc. v. Ames Realty II, Inc.*, 288 B.R. 339 (Bankr. S.D.N.Y), *aff'd* 302 B.R. 791 (S.D.N.Y. 2003).

---

[3] As a practical matter, RMLP's argument that it did not receive notice in a timely fashion is especially weak since RMGPLP and RMLP share the same business address to which the Election Notice was sent.

In *Ames*, the landlord twice received written, timely notice for the exercise of a renewal option but contended that the notices were defective because they were written on the letterhead of the tenant's parent company and failed to expressly say that the tenant, as opposed to the parent company, was exercising the option. *Ames*, 288 B.R. at 341. The bankruptcy court found that the tenant was entitled to judgment as a matter of law, based upon traditional contract principles of offer and acceptance. In so holding, the court made the following observations, which are applicable to the matter before this Court:

> Here, each of the December 1995 Exercise Letter and December 2000 Exercise Letter unequivocally and unmistakably evidenced the tenant's intention to renew the Falls Church Store Lease, and objective analysis leaves no room for any contrary conclusion. The letters were written by Tenant's Vice-president, John Hlis. While he had the title "Vice-president, Real Estate" at Ames Department Stores, he was also a Vice-President of Ames Realty II, and there has been no hint that he lacked either actual or apparent authority to say what he did. In each of the December 1995 and December 2000, Mr. Hlis sent written, timely letters to the Landlord, by certified mail, return receipt requested. Each of the letters unequivocally gave notice of the exercise of the option to extend the lease. On their "Re" lines, they identified the city, state and store number of the Falls Church Store, and specified the dates on which the option periods would begin and end. They even confirmed the number of available renewal option opportunities that would remain after the option exercise. The communications are susceptible to only one interpretation.

*Id.* at 349. In *Ames*, the parent company had, at one time, been the tenant under the lease at issue. However, the court noted, the right to exercise the renewal option did not belong to the parent company and, thus, could not be exercised by the parent company. The court concisely stated the issue as "whether, considering objective indicia, a reasonable entity in the place of the Landlord would have understood that the option was being exercised by the Landlord's tenant." *Id.* at 351. The court held that a reasonable entity would have so concluded.

An option to extend a lease is treated as a offer and analyzed pursuant to contract law principles. *Beckenheimer's Inc. v. Alameda Assoc. L.P.*, 611 A.2d 105, 109-10 (Md. 1992). Delaware abides by the "objective" theory of contracts; that is, a contract is constructed in such a manner as to permit it to be understood by an "objective, reasonable third party". *NBC Universal, Inc. v. Paxson Communications Corp.*, 2005 WL 1038997, at *5 (Del. Ch. 2005). The relevant issue is whether Eckerd expressed the intent to renew the Lease Agreement when it sent out the Election Notice. This determination must be based upon objective criteria: the party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestations to mean. *Ames*, at 348 ("The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.") (quoting *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954); *see also "Industrial America", Inc. v. Fulton Indus., Inc.*, 285 A.2d 412, 416 (Del. 1971) ("The law thus rightfully imputes to a person an intention corresponding to the reasonable meaning of his words and deeds."). Accordingly, the question is whether the objective, reasonable interpretation of the Election Notice is that the letter was an acceptance by Eckerd, the tenant of record, of RMLP's offer to extend the Lease Agreement.

Eckerd's Election Notice bears remarkable similarity to the notice sent in the *Ames* case. It was signed, "Peter Schmitz, Vice President". Mr. Schmitz is a Vice President of both Eckerd and its parent company, JCG. The "Re" line of the Election Notice read, "Eckerd Store #6291R; 4493 Highway 1, Rehoboth Beach, DE". The letter was addressed to "Landlord" and explicitly stated the author's intent to exercise one of the five-year options provided for in the Lease Agreement and identified the new termination date of the Lease Agreement. Within the text of the letter, the Rhode Island return address used on the letter was identified as that of the Eckerd Corporation Real Estate

Department. The letterhead contained the "'New' Eckerd Pharmacy" logo as well as the "Brooks Pharmacy" logo. The "'New' Eckerd Pharmacy" logo is comprised of the "traditional" Eckerd logo (that is, the logo that appeared on previous correspondence sent by Eckerd to RMLP) with the small print embellishment of the word "New" in the upper left hand corner of the logo.

Mr. Weinberg signed an affidavit attesting to the fact that he was "uncertain" as to the actual author of the Election Notice and that the Rhode Island return address used was not known to him. Ms. Rose submitted an affidavit attesting to the fact that she had sent written notice to RMGPLP in 2004 to the effect that all communications concerning the Lease Agreement should be directed to Eckerd at the Rhode Island address. In any event, on October 5, 2005, Mr. Weinberg sent a letter to Eckerd's Real Estate Department at the Rhode Island address. This letter directed Eckerd to surrender the leased premises no later than April 1, 2006, in accordance with the terms of the Lease Agreement. There is no indication that this letter was sent to any other location, specifically, the letter was not sent to Eckerd's headquarters in Largo, Florida, the location that Mr. Weinberg alleges he associates with his business dealings with Eckerd. This behavior is in comparison to that of the landlord in *Beckenheimer's*, where the landlord sent a similar letter, advising tenant that it had failed to give timely notice of exercise of option to renew, to the address for the tenant as it appeared in the sublease. 611 A.2d at 108. Mr. Weinberg's actions definitively demonstrate he was not confused by the Rhode Island return address. There is no question that Mr. Weinberg knew that Eckerd had sent the Election Notice.

The *Beckenheimer's* case, cited with approval by the *Ames* court, also involved similar facts to those before the Court. In that case, the tenant attempted to renew its lease by way of correspondence mistakenly written on the letterhead of the tenant's parent company. At the time the

letter was written, the author of the letter believed that the parent company was the tenant of record under the lease. No matter, the Court held, since an objective analysis led a reasonable third party to believe the option was being exercised by the holder of the option, the actual tenant of record. RMLP has not alleged that Mr. Schmitz thought he was exercising the option on behalf of the JCG. However, the *Beckenheimer's* court adopted an analysis the Court finds instructive here: the landlord's argument can be tested by reversing the direction of the action. That is to say, would Eckerd be able to disclaim its election to renew the Lease Agreement if it sent timely notice on its parent company letterhead to its landlord's general partner? The answer is an unequivocal "no". The Election Notice was on letterhead that contained a logo that was identifiable as Eckerd's. The "Re" line of the letter referenced the specific location of the leased premises. The text of the Election Notice identified the tenant of record by name and proper address. Notice to a general partner constitutes notice to the partnership as a whole under Delaware law. In addition, the parties have a history of a business relationship. The Election Notice need not provide additional details.

RMLP presents one final position that the warrants comment. RMLP posits that Mr. Schmitz did not have apparent authority to execute the option to renew the Lease Agreement. However, there have been no facts introduced to suggest that Mr. Schmitz did not have *actual* authority. In point of fact, Mr. Shmitz has been a Vice President of Eckerd since July 31, 2004. RMLP does not cite, and the Court cannot located, any case law for the proposition that one with actual authority cannot bind a principal because of a failure to demonstrate affirmatively apparent authority. RMLP's argument in this regard is without merit.

In conclusion, the Court finds that all three of the requirements of the Election Notice set out by the Lease Agreement – that notice be (a) sent by tenant of record (b) to landlord of record (c)

in a timely fashion – were satisfied by the delivery of the Election Notice to RMGPLP prior to October 1, 2005. The Court reaches this conclusion employing the objective theory of contract law, not by exercising any equitable principles.

**Conclusion**

For the above-stated reasons, Eckerd's Motion for Summary Judgment is granted and RMLP's Motion for Summary Judgment is denied.

Very truly yours,

T. Henley Graves

oc: Prothonotary
cc: Attorneys