

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

216 JAMAICA AVENUE, LLC,)	
)	Civil Action No. 06-1288
Plaintiff,)	
)	(Judge Boyko)
v.)	
)	
S & R PLAYHOUSE REALTY CO.,)	
)	
Defendant.)	
)	

**SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Invoking the doctrines of merger by deed and estoppel by deed, defendant, S&R Playhouse Realty (“S&R”), has argued that the deed by which plaintiff, 216 Jamaica Avenue (“Jamaica”), acquired the land under the Lease at issue in this case and the estoppel certificate referenced in that deed bar enforcement of the gold clause as written. *See, e.g.*, Mem. in Supp. of Def.’s Mot. for Summ. J. at 12-15. We have demonstrated that these arguments are wrong for a variety of reasons, but most fundamentally because neither S&R nor any predecessor lessee was a party to the deed or the estoppel certificate. It is beyond peradventure that the terms of a contract, such as the Lease, cannot be altered unilaterally. *See* Pl.’s Mem. in Opp’n to Def.’s Mot. for Summ. J. at 11.

During his recent deposition, Patrick M. Lott, whom S&R designated as its official representative under Rule 30(b)(6), admitted that neither the estoppel certificate nor the deed

could vary the terms of the Lease.¹ Mr. Lott stated that, to the extent that the estoppel certificate or the deed recites a term of the Lease differently from what is stated in the Lease, he would consider such a recitation in the estoppel certificate or the deed to be “a mistake” because “it’s the lease that defines the rent for” S&R. Deposition of Patrick M. Lott (“Lott Dep.”) at 82-85. Mr. Lott stated further that it is not possible for an estoppel certificate to modify an underlying lease because the estoppel certificate is “not between the parties” to the lease. Lott Dep. 81.² Thus, S&R’s designated representative admits that its own arguments based upon the doctrines of merger by deed and estoppel by deed have no merit.

For the foregoing reasons and the reasons stated in our previous briefs, the Court should grant Jamaica’s motion for summary judgment and deny S&R’s motion for summary judgment.

April 23, 2007

Respectfully Submitted,

/s/ Charles J. Cooper

James B. Niehaus (0020128)
jniehaus@frantzward.com
Christopher G. Keim (0067117)
ckeim@frantzward.com
FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114-1230
216-515-1660
216-515-1650 (fax)

Charles J. Cooper
ccooper@cooperkirk.com
David H. Thompson
dthompson@cooperkirk.com
David Lehn
dlehn@cooperkirk.com
COOPER & KIRK, PLLC
555 Eleventh Street NW
Suite 750
Washington, DC 20004
(202) 220-9600
(202) 220-9601 (fax)

Attorneys for Plaintiff

¹ Mr. Lott is the senior vice president of Forest City Commercial Group. Deposition of Patrick M. Lott (“Lott Dep.”) at 7. As such, Mr. Lott has responsibility for the Halle Building. Lott Dep. at 7.

² Rather, as Mr. Lott explained, estoppel certificates are prepared “for a **lender**’s benefit.” Lott Dep. at 77 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify on April 23, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this through the Court's system.

/s/ Charles J. Cooper

Charles J. Cooper
COOPER & KIRK, PLLC
555 Eleventh Street NW
Suite 750
Washington, DC 20004
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com