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

216 JAMAICA AVENUE, LLC,	)	**CASE NO. 1:06CV1288**
	)	
Plaintiff,	)	**JUDGE CHRISTOPHER A. BOYKO**
	)	
v.	)	
	)	**MEMORANDUM IN SUPPORT OF**
S & R PLAYHOUSE REALTY CO.,	)	**DEFENDANT S&R PLAYHOUSE**
	)	**REALTY CO.'S MOTION FOR LEAVE**
Defendant.	)	**TO AMEND ANSWER *INSTANTER***
	)	

I. Introduction

Pursuant to Fed. R. Civ. P. 15(a), S&R Playhouse Realty Co. ("S&R") respectfully moves this Court for leave to amend its Answer *instanter*.[1] Following this Court's granting of summary judgment in favor of S&R (Dckt. 43), plaintiff 216 Jamaica Ave. LLC ("Jamaica") appealed. On appeal, the Sixth Circuit held only that the gold clause in the lease that is at the center of this dispute ("Lease"), is "enforceable." The most pressing questions, however, were not addressed by the Appellate Court and now remain on remand for consideration by this Court. The issues include interpretation of the gold clause, determination of an obligation, if any, it may impose upon the parties, and "any other defenses the district court has not yet had an opportunity to address in the first instance, including S&R's estoppel-by-deed and waiver defenses." (Dckt. 47 at 7). S&R has not yet had a full and fair opportunity to present all of its

[1] Amended Answer is attached as Exhibit A.

defenses. Given the Sixth Circuit's decision, S&R seeks to have a full and fair opportunity to present all of its defenses.

S&R has not previously amended its Answer. Nor did this Court reach the point of issuing a Scheduling Order imposing a deadline by which the parties were to amend the pleadings or add parties, but rather pursuant to the Court's Scheduling Order, this action proceeded directly to a Summary Judgment briefing schedule. (Dckt., non-document, 8/15/06.) As a result, between August 15, 2006 and November 27, 2006, slightly more than four months, a brief period of discovery was conducted and all Summary Judgment briefs through replies were filed with the Court. During this period, S&R moved the Court to extend the Summary Judgment briefing schedule until February 2007 for the purposes of completing discovery (Dckt. 23); however, the Court ultimately denied that motion on November 14, 2006.

The parties then from December 2006 until May 2007, following the completion of the Summary Judgment briefing, sought leave from the Court to file various Surreplies and supplemental briefings, which were also ultimately denied. (Dckt., non-document, 7/02/2007.) In short, this case proceeded upon an accelerated schedule from the time of its filing to the time of the last Summary Judgment brief, which was slightly more than six months in duration. S&R now seeks to proceed with this case at a pace that allows it to present all relevant law and facts to the Court in the interests of justice, beginning with an Amended Answer that sets forth two additional defenses.

In addition to the defenses specifically referred to by the Sixth Circuit in its opinion (waiver and estoppel-by-deed), S&R seeks to assert the defenses of equitable estoppel and impracticability/impossibility. S&R should be allowed to assert these defenses for reasons briefly set forth below.

II. Law and Argument

Rule 15 provides that "leave [to amend] shall be freely given when justice requires." This liberal view ensures that cases are tried on their merits rather than pleading technicalities. *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (citing *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). Accordingly, leave must be granted in the absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendment previously allowed, or undue prejudice. *Foman v. Davis*, 371 U.S. 178, 182 (1962). None of these factors are present here.

A. S&R Should Be Allowed to Assert The Defense of Equitable Estoppel

Under Ohio law, the elements of equitable estoppel are similar to but distinct from those of waiver. *Chubb v. Ohio Bur. of Workers' Comp*. (1998), 81 Ohio St. 3d 275, 279, 690 N.E.2d 1267. The defense of equitable estoppel is present when 1) a representation is made by one party of words, acts, or silence; 2) the representation communicates some fact or state of affairs in a misleading way to the other party; 3) the representation induces actual reliance by the other party, and such reliance is reasonable and in good faith; and 4) the other party would suffer prejudice if the representing party were not estopped or precluded from contradicting the earlier representation. *Sloan v. Shafer Commer. & Indus. Servs.*, No. 2008-T-0013, 2008-Ohio-4765, ¶ 20 (11th Dist. 2008) (citing *Grange Mut. Cas. Co. v. Smock* (11th Dist. Sept. 14, 2001), No. 2000-G-2293, 2001 Ohio App. LEXIS 4127, at *9 (attached as Exh. B)).

Whereas waiver includes an intent to relinquish, "[e]quitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment." *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn*. (1994), 71 Ohio St.3d 26, 34, 641 N.E.2d 188. "Thus, estoppel

involves the conduct of both parties, whereas waiver depends upon what one intends to do." *Sloan*, 2008-Ohio-4765, at ¶ 19.

In this action, S&R has already set forth the basis for the defense of waiver.[2] While Jamaica has asserted that S&R's defense of waiver is unavailing because S&R did not rely upon the conduct amounting to waiver (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. at 20.), S&R will show that this assertion is false. This action is easily distinguished from other gold clause lease cases in which the lessee was unable to show reliance. *See, e.g.*, *Wells Fargo Bank, N.A. v. Bank of Am. NT & SA*, 38 Cal. Rptr. 2d 521, 529-30 (Cal. Ct. App. 1995) (where payment made by lessee allegedly in reliance on lessor's conduct was made "pursuant to a preexisting legal obligation and not in reliance upon any conduct by plaintiffs" and property taxes and maintenance and repair expenses allegedly made by lessee in reliance on lessor's conduct "were undertaken pursuant to the terms of the lease and not in reliance").

Here, unlike most of the other gold clause lease cases, S&R is the tenant in name only and it sub-leases the space that is the subject of this action to third parties. S&R will show that based upon inducements by Jamaica's predecessor, in whose shoes Jamaica stands (hereinafter, also "Jamaica"), S&R made substantial capital improvements, and entered into long-term sub-leasing and lending arrangements in reliance upon, among other things, Jamaica's course of conduct in accepting rent payments of $35,000 per year in rent for almost a quarter of a century, and upon Jamaica's issuance of several estoppel certificates to S&R's lenders for S&R's benefit, all of which state that rent was $35,000 per year. Jamaica's course of conduct, including its acceptance of rent and its issuance of estoppel certificates, unambiguously indicated that rent

[2] Where an amended cause of action is "not so different as to cause prejudice" leave to amend should be allowed. *Tefft v. Seward*, 689 F.2d at 639.

was $35,000 per year, with no mention whatsoever of a fluctuating rent based upon the price of gold. In reliance upon these representations, S&R borrowed millions of dollars and entered into long-term sub-leasing arrangements that would be severely prejudiced by the change of rent demanded by Jamaica in this action. Jamaica's rent demand amounts to an increase of several thousand percent. S&R thus respectfully requests leave to amend its Answer to include the defense of equitable estoppel.

B. S&R Should Be Allowed To Assert The Defense of Impracticability/ Impossibility

The Sixth Circuit has remanded to this Court the interpretation of the meaning of the gold clause in the Lease, and for a determination of the obligation it imposes, if any, upon S&R. (Dckt. 47 at 7.) Indeed, the clause to be interpreted here is among the most sparsely worded of any that may be found in a long line of gold clause cases going back to the 19th Century. The Lease states in pertinent part:

> All of said rents shall be paid in gold coin of the United States of the present standard of weight and fineness….

(Lease at 2.) The Lease is devoid of other qualifying language, and accordingly it is to be read plainly. The rent is required to be paid in gold coin of the United States.

A requirement to pay in gold coin of the United States is commercially impractical if not entirely impossible. The gold coins in existence at the time of the Lease in 1911 were removed from circulation by law immediately following the Great Depression. Gold Reserve Act of 1934, ch. 6, §§ 10, 12, 48 Stat. 337, 341-43. No new gold coins were issued by the United States at any time from 1934 up to and including the time S&R entered into the Assignment in May 1982. At the time of the 1982 Assignment, it would have thus been obvious to all of the parties—the lessor, the prior lessee, and S&R as the new lessee—that there were no gold coins of the United

States, and thus the clear meaning of the Lease was that S&R would pay $35,000 in annual rent in currency, which is exactly what the Lease states and what the parties proceeded to do.

While Jamaica has argued that the clause requires a calculation and conversion of rent based upon the fluctuating value of gold, the Lease not only does not mention any such calculation and conversion, but the 1977 law upon which Jamaica relies—31 U.S.C. § 5118—plainly distinguishes a gold clause requiring a bare requirement to pay in gold coin from a gold clause requiring a conversion of value and payment based upon the price of gold. The gold clause at issue here is not the type that requires payment merely in gold bullion (with respect only to the intrinsic value of the gold), or of the type that requires payment based upon a measure of value indexed to the price of gold. Those types of gold clauses are addressed separately in 31 U.S.C. § 5118(a)(1)**(A)** and **(C)**. The gold clause in this case is defined under 31 U.S.C. § 5118 (a)(1)**(B)**:

> (a) In this section—
>
> (1) "gold clause" means a provision in or related to an obligation alleging to give the obligee a right to require payment in—
>
> (A) gold;
> **(B) a particular United States coin or currency**; or
> (C) United States money measured in gold or a particular United States coin.

In short, the gold clause here does not provide for a calculation and conversion, as urged by Jamaica, to convert $35,000 to ounces of gold at the inception of the Lease and then to reconvert ounces of gold back into dollars according to the price of gold at the time rent is due. (*See, e.g.*, Pl.'s Mem. in Spt. of Mot. for Summ. J. at 4, fn 3.) Nor is the gold clause of the type that requires payment in gold bullion (rather than gold coin), which is also possible under § 5118(a)(1)(C).

Jamaica attempts to rely upon *Trostel* once again for support (*see Id*.), but the gold clause before the Court here differs significantly from that in *Trostel*. The *Trostel* clause states, "**at the option of the lessor**, all payments under this lease shall be made in gold coin of the United States of America, of **or equal to** the present standard of weight and fineness." *Trostel v. American Life & Cas. Ins. Co.*, 168 F.3d 1105, 1106-07 (8th Cir. 1999) (emphasis added). In *Trostel,* the lessor had the option of requiring payment in gold coin **or** of having that gold coin converted to something of equal value. The language of the gold clause in *Trostel* is thus clear and falls within 31 U.S.C. § 5118 (a)(1)(B) **and** (C), at the lessor's option, but the only operative provision at the time of the *Trostel* holding would have been (C), not (B), because there was no "gold coin of the United States of America" at the time the *Trostel* obligation issued. In the present case, however, no such "conversion" language is present in the Lease. As a result, the analysis applied in *Trostel* is inapplicable because the language is different.

Because, unlike *Trostel*, the gold clause under this lease calls specifically for payment in "gold coin" and no new gold coins were issued from 1934 up until the time S&R entered into the Assignment in May 1982, the requirement to pay in gold coin of the United States was impossible, or at least, commercially impracticable.[3]

III. Conclusion

In order for this Court to determine the effect, if any, of the provision at issue, and all of the defenses applicable to this case, it is necessary to permit S&R to amend its Answer. This amendment is not sought for the purpose of delay and will not be prejudicial to Jamaica. For all

[3] S&R believes that all of the analysis it offers here under the defense of impracticability/impossibility is also equally applicable to a straightforward interpretation of the gold clause before the Court. S&R has repeatedly asserted in its briefs that the clause before this Court is a bare requirement to pay in gold coin. (*See, e.g.*, Def.'s Mem. in Spt. of Mot. for Summ. J. at 6-7.)

the reasons above and those contained in S&R's prior briefing before this Court, which is incorporated herein, S&R respectfully requests that it be allowed to amend its Answer to add the defenses of equitable estoppel and impracticability/impossibility.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Defendant S&R Playhouse Realty Co.'s Motion for Leave to Amend Answer* and *Memorandum in Support of Defendant S&R Playhouse Realty Co.'s Motion for Leave to Amend Answer* was filed electronically this 24th day of October, 2008. Parties will receive notice through the Court's electronic filing system.

/s/ Gary L. Walters
One of the Attorneys for Defendant
S & R Playhouse Realty Co.