216 Jamaica Avenue v. S & R Playhouse Realty Co. Doc. 51 Att. 1

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**
Defendant.	)	**CONTINUANCE PURSUANT TO FED.**
	)	**R. CIV. P. 56(F)**

I. Introduction and Background

Pursuant to Fed. R. Civ. P. 56(f), S&R Playhouse Realty Co. ("S&R") requests additional time to complete discovery in order to submit a full and adequate response to Plaintiff 216 Jamaica Avenue LLC's ("Jamaica") Motion for Summary Judgment, which Jamaica now seeks to renew following remand of this action from the Unites States Court of Appeals for the Sixth Circuit. (Dckt. 48.)

This action was on a fast calendar during its pendency before this Court prior to appeal to the Sixth Circuit. The action was filed on May 25, 2006, and on November 27, 2006, six months later, all motions were filed in accordance with the Court's Scheduling Order of August 15, 2006. Prior to completion of the summary judgment briefing schedule, on November 6, 2006, S&R moved the Court to extend the original schedule to allow time for additional discovery (Dckt. 25); however, the Court denied S&R's Motion and the parties completed the summary judgment briefing as originally scheduled.

Dockets.Justia.com

Nevertheless, both parties continued to seek leave to supplement the record after November 27, 2006, and filed no fewer than seven briefs with the Court respecting surreplies and supplements to the record. This continued until July 2, 2007, when the Court denied all motions or requests for additional briefing and entered summary judgment in favor of S&R. (Dckt. 42, 43, and non-document entry of 7/2/07.) The Court was divested of jurisdiction shortly thereafter by Jamaica's appeal.

Due to the abbreviated schedule of the case to date, the short period of time in which the record was developed, and the need to further develop evidence necessary to defend itself, S&R requests that the Court proceed at a pace now on remand that allows S&R to fully develop its defenses, complete discovery, adduce all supporting evidence, submit expert testimony, and supplement its briefing before the Court renders a decision on summary judgment. To this end, S&R asks that the Court continue its decision on summary judgment and set a conference between the Court and the parties for the purpose of issuing a new scheduling order.

II. <u>Law and Argument</u>

Under the Federal Rules of Civil Procedure, if a party, such as S&R, has not had the opportunity to conduct the discovery and adduce the evidence necessary to prepare a full and adequate response to a summary judgment motion, the trial court should grant a continuance in order to allow proper discovery to be conducted.

Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Rule 56(f) provides for an order of continuance to permit discovery where, as here, the party opposing summary judgment needs time to conduct discovery to counter the

movant's motion. *Iams Co. v. Kal-Kan Foods* (S.D. Ohio Mar. 31, 1998), No. C-3-97-449, 1998 U.S. Dist. LEXIS 19217, at *18-*20 (attached as Exh. A) (denying motion for summary judgment until time for discovery provided); *Nilavar v. Mercy Health Sys.*, 254 F. Supp. 2d 897, 899 (S.D. Ohio 2003).

Fed. R. Civ. P. 56(f) not only permits a court to deny or postpone consideration of a summary judgment motion so that additional discovery can be taken, in fact, "summary judgment shall only be entered against the non-moving party 'after adequate time for discovery.'" *Carter v. AT&T Communications*, 759 F. Supp. 155, 160 (S.D.N.Y. 1991) (quoting *Celotex v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)); *see also Pasquarello v. Nissan Motor Corp. in U.S.A.*, 1995 U.S. Dist. LEXIS 13078, at *9-*10 (E.D. Pa. Sept. 6, 1995) (attached as Exh. B) ("[T]his Court is required to give a party opposing a motion for summary judgment adequate time for discovery. . . . Since this matter is only five months old and, in the Court's opinion, the plaintiff has not yet had adequate time for full discovery, the defendant's Motion for Summary Judgment is hereby denied with leave to renew.").

Moreover, Fed. R. Civ. P. 56(f) "is applied with 'a spirit of liberality.'" *Carter*, 759 F. Supp. at 160 (quoting Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2740 (1983)).

One Circuit Court has noted that "when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when [that party] is denied reasonable access to potentially favorable information." *Robinson v. Transworld Airlines, Inc.*, 947 F.2d 40, 43 (2d Cir. 1991) (quoting *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980)).

In this instance, S&R has not been dilatory in seeking discovery, but rather conducted

discovery expeditiously during the short period this case was pending before the Court and timely moved for an extension of the discovery period when it learned that it would not be able to complete all discovery before the conclusion of the summary judgment briefing period. Accordingly, S&R now seeks no more than adequate time to fully develop its defenses and case, and to adduce all necessary evidence in support of its defenses, including two new defenses which S&R seeks to add through its Motion for Leave to File Amended Answer, filed concurrently with this Motion. S&R would be prejudiced in defending itself in this important case without the ability to conduct discovery, prepare its defenses, and present them in the most effective way to this Court.

A. S&R has moved the Court for leave to add two additional defenses.

S&R has moved for leave to file two additional defenses: equitable estoppel and impracticability/impossibility.[1] Both of these defenses require time and discovery for full development. Moreover, expert testimony will be helpful to the Court in fully adjudicating S&R's defenses, as well as in interpreting the language of the Lease. S&R has not had adequate time to develop these defenses or their related expert testimony.

1. S&R seeks to assert the defense of equitable estoppel.

S&R will show that it relied to its detriment upon Jamaica's predecessor's representations and conduct respecting the amount of rent due under the Lease, and consistent with the defense of equitable estoppel, that it will be severely prejudiced by the new and increased rent that Jamaica now demands purportedly under the terms of the Lease. S&R seeks to fully adduce evidence proving that it reasonably relied upon Jamaica's predecessor's conduct and assurances

---

[1] S&R incorporates herein its Motion for Leave to Amend Answer *Instanter*, as well as its memorandum in support of that Motion.

concerning the amount of rent owed under the Lease, and as a result that (1) it made significant capital improvements to the building situated upon the premises subject to the Lease, (2) it entered into long term subleases with third-party tenants with respect to the building, many of which leases straddle the property line between the leased premises and the balance of the Halle Building and land owned by S&R, and (3) it borrowed millions of dollars from financial institutions, which loans have been secured by mortgages on the property including leasehold mortgages on the Halle Building above the ground leased premises.

In addition, S&R will present evidence of the severe prejudice it will suffer by Jamaica's now belated demand for an extraordinary rent increase. Justice should not allow Jamaica to change course after almost 25 years to S&R's substantial detriment, and S&R requires time to adduce evidence in support of the defense of equitable estoppel. Some of the evidence respecting Jamaica's predecessor's conduct, which goes directly to the element of inducement, is now decades old and requires time to obtain. S&R made substantial efforts to uncover this evidence prior to the end of the original summary judgment briefing period, but was unable to complete the effort.

2. The payment requirement of the gold clause in the Lease before the Court is impossible to perform.

S&R additionally seeks time to develop and submit evidence to show that the Lease's requirement to pay in "gold coin of the United States" is impossible to perform. The Lease is plain on its face and at the time that the obligation issued to S&R in 1982, it was equally plain to all the parties to the Assignment that payment could not be made in gold coin of the United States. S&R will show there was no U.S. gold coin in circulation in 1982, and more, that the Lease is not of the type that calls for payment to be made in an equivalent value of gold. While current law may allow leases to be written in a way that they may require a rental amount to be

indexed to the price of gold, the Lease before the Court is not one of those leases. The bare language of this Lease rather simply requires that payment of rent be made in gold coin of the United States.

S&R anticipates that Jamaica will contend that the term "[a]ll of said rents shall be paid in gold coin of the United States of the present standard of weight and fineness" means something far different than is stated by the plain language of the clause. For instance, Jamaica has argued in its Summary Judgment Motion—which it now seeks to renew— that the clause requires a conversion to be made from $35,000 to ounces of gold at the inception of the Lease, and then from gold back to currency based upon the price of gold at the time rent is due. (*See* Pl.'s Mem. in Spt. of Mot. for Summ. J. at 4, fn 3.)

In making this argument, however, Jamaica relies upon the holding in *Trostel v. American Life & Cas. Ins. Co.*, 168 F.3d 1105 (8th Cir. 1999), which is based upon an interpretation of a very differently-worded gold clause that contains "conversion" language. To illustrate the distinct difference between the lease in *Trostel* and the Lease here, it is only necessary to see the two clauses side by side:

(1) The gold clause in the *Trostel* lease provides in pertinent part:

> …**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, 168 F.3d at 1106-07 (conversion language emphasized).

(2) The gold clause in the Lease here only provides:

> 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 in this case does not contain or suggest a requirement to make any conversion to determine the amount of rent.[2] To the extent that the original lessor may have had an intention to protect himself from a fluctuation in the currency, he did so only by demanding payment in gold coin of the United States, an obligation that was possible at the time the original Lease was executed, but that was impossible at the time of the assignment to S&R in May 1982.

Moreover, to the extent that the clause may be read to require anything other than the payment of rent by gold coin of the United States, S&R asserts that expert testimony will be needed and helpful to interpret the meaning of the language of this clause.[3] Expert testimony is admissible when the provision in question may have a special meaning given to it by an industry. *Construction Interior Sys. v. Marriott Family Restaurants*, 984 F.2d 749, 756 (6th Cir. 1993); *see also Nucor Corp. v. Neb. Public Power Dist.*, 891 F.2d 1343, 1350 (8th Cir. 1989) ("Courts have frequently recognized the value of expert testimony defining terms of a technical nature and testifying as to whether such terms have acquired a well-recognized meaning in the business or industry."); *Ways v. City of Lincoln*, 206 F. Supp. 2d 978, 991 (D. Neb. 2002) ("testimony defining a term of art as it is used within a given field may be allowed."); *Mickey Bearman Co. v. John Morrell & Co.*, 2001 U.S. Dist. LEXIS 26233, at *22 (C.D. Cal. Oct. 29,

---

[2] The statute at the center of this case—31 U.S.C. § 5118—is perfectly consistent with S&R's position, and the statute recognizes and distinguishes three types of gold clauses. The type present in this case—which is found in 31 U.S.C. § 5118 (1)(a)(B)—does not by its simple language provide for a conversion of gold into a value of currency different than that stated on the face of the contract, which in this case is $35,000. By contrast, the gold clause found in *Trostel* above, containing "conversion" language, is addressed in 31 U.S.C. § 5118 (1)(a)(C).

[3] S&R believes that the defense of impossibility will be implicated in most of its aspects by the Court's mere interpretation of the meaning of the gold clause contained in the Lease, and expert testimony will be equally helpful in that interpretation.

2001) (attached as Exh. C) ("Expert testimony is admissible to show custom and usage in an industry, even if that testimony embraces the ultimate issue to be decided by the trier of fact.").

Gold clauses are not part of modern contract law, but are generally clauses dating to before the Great Depression and are inevitably mired in archaic and arcane language and practices, which are neither transparent nor easy.[4] While S&R contends that the clause is plain on its face and quite literally required an impossible measure of performance in 1982, Jamaica has argued in its Motion for Summary Judgment for a much different meaning than contained in the words of the clause. To the extent the Court is inclined to give any weight to Jamaica's interpretation, expert testimony will be helpful in ultimately determining the meaning of the clause before the Court.

III. Conclusion.

For the reasons above, and those set forth in S&R's Motion for Leave to Amend Answer, S&R requests that the Court continue its decision respecting the current summary judgment briefing, and set a Case Management Conference for the purpose of issuing a scheduling order for the conduct of discovery, the timing of a supplemental briefing period, and such other events as the Court deems proper.[5]

---

[4] S&R has not discovered a single case that addresses a gold clause in an original contract or lease written after 1977.

[5] The Affidavit of Gary L. Walters In Support of Motion for Continuance Pursuant to Fed. R. Civ. P. 56(f) is attached as Exhibit D.

Respectfully submitted,

/s/ Gary L. Walters

Stephen D. Williger (0014342)
Gary L. Walters (0071572)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114-1291
(216) 566-5500
(216) 566-5800 – Fax
Stephen.Williger@ThompsonHine.com
Gary.Walters@ThompsonHine.com

Attorneys for Defendant
S & R Playhouse Realty Co.

CERTIFICATE OF SERVICE

A copy of the foregoing *Defendant S&R Playhouse Realty Co.'s Motion for Continuance Pursuant to Fed. R. Civ. P. 56(f)* and *Memorandum in Support of Defendant S&R Playhouse Realty Co.'s Motion for Continuance Pursuant to Fed. R. Civ. P. 56(f)* 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.