STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: MAY 18, 2012)

OMNI-COMBINED W.E., LLC	:	
	:	
v.	:	**C.A. No. PB 10-2530**
	:	
20/20 COMMUNICATIONS, INC.	:	

DECISION

SILVERSTEIN, J. Before the Court is Defendant 20/20 Communications, Inc.'s (20/20 Communications) Motion for Summary Judgment on the Issue of Damages, as well as Plaintiff Omni-Combined W.E., LLC's (Omni) Motion for Summary Judgment, both pursuant to Super. R. Civ. P. 56. At the center of this litigation is the disputed termination of a commercial lease between Omni, the Landlord, and 20/20 Communications, the Tenant. 20/20 Communications moves the Court to grant summary judgment on the issue of damages, arguing that an acceleration clause contained in the lease is unenforceable by law. In Omni's motion, it requests the Court to grant summary judgment in its favor on its breach of contract claim.

I

Facts and Travel

On January 12, 2009, 20/20 Communications entered into a written commercial lease agreement (Lease) with Omni for the rental of office space owned by Omni and located at 220 West Exchange Street, Suite 202, in Providence, Rhode Island. See Pl. Omni-Combined W.E., LLC's Mot. for Summ. J. Against Def. 20/20 Communications, Inc. (Pl.'s Mot. for Summ. J.) Ex. 1 (Lease). The Lease set a term of three years, beginning February 1, 2009 and ending

January 31, 2012. Id. Pursuant to the Lease, Tenant[1] was to pay monthly rent and additional rent—such as common area expenses, utilities, and other assessments. See id. The rent was due "in equal monthly installments, in advance, on the first day of each calendar month . . . ." Id. at § 1.4. In the event Tenant failed to timely pay rent, the Tenant could be subject to a late charge equal to ten percent (10%) of the total unpaid amount. Id. at § 1.6.

Among its terms, the Lease contained an Early Termination provision, negotiated by the parties to permit the Tenant to terminate the Lease prior to its expiration date under certain conditions. See id. at § 1.3; Jason Gross Affidavit ¶ 2, Jan. 27, 2011. The section provides:

> "In addition to those rights set forth in Sections 5.1 and 5.2,[2] it is agreed that Tenant may terminate this Lease ("Early Termination") at any time after the First (1st) anniversary of the Commencement Date of the Lease, for any reason, provided that Tenant, or any Tenant affiliate, will not be occupying office space within a forty (40) mile radius of the Leased Premises during the period between Early Termination and the Expiration Date. The following terms and conditions shall, in any and all events, apply to Early Termination; (a) Tenant shall not at any time during the Term of this Lease become in default of any material provision of this Lease; (b) Tenant shall give Landlord written notice not less than Sixty (60) days prior to the intended Early Termination date, and; (c) such notice shall not be effective unless accompanied by a check for the sum of Seven Thousand and 00/100 Dollars ($7,000.00) reduced by Nine and 59/100 Dollars ($9.59) for each day less than Seven Hundred Thirty (730) Days (years 2 and 3 of the Lease) that the balance of the Lease Term will be reduced. Tenant shall be required to continue to pay any and all rent called for hereunder for the remainder of the Term between the date of said Notice through Early Termination. If at any time subsequent to Tenant providing notice of Early Termination, as provided hereunder, Tenant defaults under any material term of this Lease, then Tenant's right to Early Termination shall become null and void in the sole and absolute discretion of Landlord." (Lease § 1.3.)

[1] Throughout, the term "Tenant" refers to 20/20 Communications, and the term "Landlord" refers to Omni.

[2] Sections 5.1 and 5.2 of the Lease concern Condemnation and Destruction of the leased premises and are in no way at issue here.

The conditions include written notice accompanied by a check for an amount determined by the number of days remaining in the lease term. See id. Notice, as required by the lease, ". . . shall be hand delivered or sent by certified mail, return receipt requested . . . ." (Lease § 7.2.)

Additionally, although the Tenant has the option of Early Termination if compliant with the set conditions, the Tenant's right to Early Termination becomes "null and void" if there is default under any material term of the Lease. (Lease § 1.3.) One term of the Lease specifically provides that "if Tenant shall abandon or vacate the Leased Premises . . . then . . . Tenant shall be in default of this Lease." (Lease § 6.1(a).) Upon such default, the "Landlord shall then and at any time thereafter be entitled to immediate possession of the Leased Premises . . . ." (Lease § 6.1(b).) Further, the Lease includes a rent acceleration provision, stating:

> "Landlord shall immediately be entitled to recover from Tenant, and Tenant shall forthwith pay Landlord as compensation . . . any unpaid rent, or other payments called for hereunder accrued to such date, a sum equal to the amount of all payments called for hereunder to be paid by Tenant for the remainder of the Lease Term." Id.

Further, "[i]n the event of Tenant's default hereunder, Landlord shall be entitled to recover from Tenant the amount of any attorneys' fees, costs, and expenses reasonably incurred by Landlord in enforcing its rights and remedies hereunder." (Lease § 6.3.)

A later section of the Lease specifies with regard to vacating the premises that:

> "[i]n the event the Tenant during the Term of this Lease, or any renewal thereof, discontinues operation of its business, at the leased premises, for a period of twenty (20) days or more, Landlord shall have the right and option within ten (10) days written notice to terminate this Lease and accelerate all rent and other charges due under this Lease." (Lease § 7.4.)

Accordingly, both sections 6.1 and 7.4 provide so-called acceleration clauses, purportedly entitling the Landlord to recover all rent that would be due under the Lease in the event of a breach by the Tenant.

In September or October of 2009, 20/20 Communications attempted to exercise its right to Early Termination of the Lease, to be effective April 1, 2010. (Gross Aff. ¶ 4.) 20/20 Communications asked Omni what the actual amount of the termination fee would be, allegedly because 20/20 Communications had difficulty calculating the amount from the formula set forth in the Lease. See id. at ¶¶ 5-6; Lease § 1.3. Omni never responded to inform 20/20 Communications how much it owed for the termination fee. (Gross Aff. ¶ 9.)

However, 20/20 Communications vacated the premises and discontinued its operations there as of December 21, 2009.[3] See Pl.'s Mot. for Summ. J. Ex. 4 (Def.'s Resp. to Pl.'s First Req. for Admis.) at ¶ 113, Ex. 5 (Def.'s Ans. to Interrogs. Propounded by Pl.) at ¶ 12. 20/20 Communications ceased making rent or other payments as of March 1, 2010, last paying rent for the month of March. See Dominic Shelzi Affidavit ¶ 11, Jan. 31, 2011.

20/20 Communications cannot prove that it sent notice of Early Termination to Omni by either hand delivery or certified mail, return receipt requested.[4] See Pl.'s Mot. for Summ. J. Ex. 3 (Jason Gross Dep., Aug. 5, 2010) at 34:6-18, 79:16-21. Furthermore, 20/20 admits it never sent notice accompanied by a check for the termination fee. See id. at Ex. 4 (Def.'s Resp. to Pl.'s First Req. for Admis.) at ¶¶ 106-08, Ex. 3 (Gross Dep.) at 30:19-31:20, 60:14-25. It also

[3] Omni contends that 20/20 Communications vacated the premises prior to that date, but 20/20 Communications disputes that fact. Through discovery in this matter, though, 20/20 Communications admitted to vacating the office space in December 2009.

[4] The purported notice, attached as an exhibit to the summary judgment motions and affidavits, states that it was sent "Via Certified Mail" on October 17, 2009. See Gross Aff. Ex. 3. Omni articulates that 20/20 Communications has not provided any evidence that the notice was in fact sent certified mail, return receipt requested, or hand delivered.

appears that after vacating the premises but before the expiration of the term of the Lease, 20/20 occupied office space in Quincy, Massachusetts, within a forty-mile radius of the leased premises. See id. at Ex. 4 (Def.'s Resp. to Pl.'s First Req. for Admis.) at ¶¶ 9-10.

On March 9, 2010, Omni sent written notice of default to 20/20 Communications, demanding, among other things, accelerated rent. (Pl.'s Mot. for Summ. J. Ex. 12.) 20/20 Communications has not made any payments to Omni since March, 2010, when Omni declared default and demanded accelerated rent. See Shelzi Aff. ¶ 11. Omni filed the instant action on April 28, 2010 for breach of contract and breach of good faith and fair dealing. Omni claims 20/20 Communications breached the Lease by failing to effectively exercise its Early Termination right, and subsequently, defaulted on the Lease by vacating the premises and by failing to pay rent due.

20/20 Communications moved for summary judgment on the issue of damages, claiming the acceleration clause in the Lease is punitive and legally unenforceable. Omni objected to 20/20 Communications' motion, and Omni moved for summary judgment on Count I of its Complaint, alleging 20/20 Communications breached the Lease contract. 20/20 Communications objected to Omni's motion. Hearing was held on the cross-motions for summary judgment and this Court took the matter under advisement.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On

consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or on mere legal opinions and conclusions. Hill, 11 A.3d at 113. The opposing party has "an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Lynch v. Spirit Rent-a-Car, Inc., 965 A.2d 417, 424 (R.I. 2009) (quoting Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 46 (R.I. 2001).

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

In 20/20 Communications' motion for partial summary judgment, it argues that the acceleration clauses contained in the Lease are unenforceable as a matter of law because they are punitive liquidated damages provisions. Omni opposes 20/20 Communications' motion, arguing that the clauses comport with current Rhode Island law and the freedom to contract between sophisticated commercial parties. In its own separate motion for summary judgment, Omni seeks judgment as a matter of law that 20/20 Communications breached the Lease contract. 20/20 Communications objects to that motion by arguing that Omni terminated the Lease, that Omni acted in bad faith, and again that the acceleration clause is unenforceable. Because the parties' motions are related and involve some of the same arguments, the Court will address both in this Decision, organizing the analysis by issue.

A

Acceleration Clause in Commercial Lease

20/20 Communications posits that the acceleration clauses in the Lease are unenforceable because they constitute punitive liquidated damages provisions. 20/20 Communications relies on this argument in support of its own motion for summary judgment and in objection to Omni's motion for summary judgment. Omni, conversely, argues the acceleration clauses are enforceable contractual provisions.

Two sections of the Lease between 20/20 Communications and Omni contain acceleration clauses. Section 6.1(b) provides that upon any default, the Tenant shall pay to the Landlord "a sum equal to the amount of all payments called for hereunder to be paid by Tenant for the remainder of the Lease Term." Section 7.4 also provides that if the Tenant vacates the

premises under certain conditions, the Landlord has the right to "accelerate all rent and other charges due under this Lease."

An acceleration clause is a provision of a lease that requires the tenant to pay off sooner than would otherwise be required the remainder owed under the Lease if a default or breach occurs. See Black's Law Dictionary, acceleration clause (9th ed. 2009) (defining acceleration clause in terms of loan agreements). Typical in promissory notes, acceleration clauses are also found in some lease agreements. Because they set the amount of damages in the event of a breach of the agreement, they are essentially liquidated damage provisions and are analyzed similarly. See NPS, LLC v. Minihane, 886 N.E.2d 670, 674 n.6 (Mass. 2008) (evaluating acceleration clause with same two-part test used to evaluate liquidated damages provisions).

Rhode Island case law is limited in its consideration of liquidated damage provisions and acceleration clauses. The primary cases discussing the enforceability of liquidated damage clauses were decided in the first half of the prior century, but nonetheless offer a framework for this Court's consideration of the acceleration clause in the present Lease.

Under Rhode Island law:

> "It is generally held that where a contract is not for the mere payment of money and there is no certain measure of damages which would naturally result from a violation of the agreement in question, the parties may fix upon a sum in the nature of liquidated damages which shall be paid as compensation for breach of the agreement." Muirhead v. Fairlawn Enter., Inc., 72 R.I. 163, 173, 48 A.2d 414, 419 (1946).

This rule has been applied as permitting enforcement of liquidated damages clauses when (1) the amount of damages caused by a breach are difficult to ascertain in advance and (2) the amount set as liquidated damages is fair and not out of proportion with the damage the party would likely sustain. See Psaty & Furhman, Inc. v. Hous. Auth. of Providence, 76 R.I. 87, 98, 68 A.2d 32, 38

(1949) (considering whether liquidated damages clause for delay constituted penalty); Wholey Boiler Works v. Lewis, 45 R.I. 441, 123 A. 595, 598 (1924) (providing analysis for whether forfeiture clause in contract constituted unenforceable penalty). A liquidated damages provision that does not meet the two-part test constitutes an unenforceable penalty.

Broadly applying the same test to accelerated rent clauses, it is clear they too are enforceable when they do not constitute a penalty. See 52A C.J.S. Landlord & Tenant § 1161 (2012) ("It has been said that accelerated-rent clauses generally are enforceable and that such a clause may constitute an enforceable liquidated-damages provision so long as it is not a penalty"); 49 Am. Jur. 2d Landlord & Tenant § 583 (2012) (describing when accelerated rent provisions within leases are enforceable and not a penalty). The Restatement comments that "parties may provide in the lease that if the tenant defaults in the payment of rent or fails in some other way to perform his obligations under the lease, the total amount of rent payable during the term of the lease shall immediately become due and payable." Restatement (Second) Property: Landlord & Tenant § 12.1, cmt. k (1977).

While not directly addressing acceleration clauses in leases, this State's courts have awarded damages provided by acceleration clauses in other contexts. See, e.g., Indus. Nat'l Bank of R.I. v. Patriarca, 502 A.2d 336, 337-39 (R.I. 1985) (upholding summary judgment damages provided by acceleration clause in mortgage note); Indus. Nat'l Bank of R.I. v. Stuard, 113 R.I. 124, 126-28, 318 A.2d 452, 453-54 (1974) (ruling inclusion and enforcement of acceleration clause does not render promissory note usurious). Specifically, the Rhode Island Supreme Court, in the context of an acceleration clause in a conditional sales contract, declined to "rewrite the contract" when "the language of the contract between the parties . . . clearly

disclose[d] an intent on their part that upon a default in the payment the full amount would become due and payable." Scullian v. Petrucci, 108 R.I. 406, 409, 276 A.2d 277, 279-80 (1971).

It is well-settled law in this State that terms of a contract—and specifically, a lease agreement—are to be applied as written when they are unambiguous and there is no proof of duress or similar circumstances. Sophie F. Bronowiski Mulligan Irrevocable Trust v. Bridges, No. 2011-20-Appeal, 2012 WL 1187727, at *5 (R.I. Apr. 10, 2012) (citing Rodrigues v. DePasquale Bldg. & Realty Co., 926 A.2d 616, 624 (R.I. 2007)) (discussing contract interpretation of lease agreement). "In construing a lease, the intention of the parties must be ascertained from the language employed in the lease." Samos v. 43 E. Realty Corp., 811 A.2d 642, 643 (R.I. 2002). It is fundamental that the "clear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." Sophie F. Bronowiski Mulligan Irrevocable Trust, 2012 WL 1187727 at *4 (quoting Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985); see Sturbridge Home Builders, Inc. v. Downing Seaport, Inc., 890 A.2d 58, 66 n.5 ("Without such a presumption about the enforceability of contracts, we would live in a world in which contract terms would be hollow promises"). Further, "[i]t is a basic tenet of contract law that the contracting parties can make as 'good a deal or as bad a deal' as they see fit . . . ." Rodrigues, 926 A.2d at 624 (quoting Durfee v. Ocean State Steel, Inc., 636 A.2d 698, 703 (R.I. 1994)).

In the context of a commercial lease, "[a]bsent some element of fraud, exploitive overreaching or unconscionable conduct on the part of the landlord to exploit a technical breach, there is no warrant, either in law or in equity, for a court to refuse enforcement of the agreement of the parties." Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc., 389 N.E.2d 113, 116 (N.Y. 1979) (enforcing under New York law an acceleration clause in twenty-year commercial lease

that tenant breached after only four months). The Rhode Island Supreme Court, under different but comparable circumstances, has upheld terms of a lease despite a defendant's claim they should be null and void as a matter of public policy. See Saunders Real Estate Corp. v. Landry, 769 A.2d 1277, 1281 (R.I. 2001) (enforcing automatic renewal clause in lease between sophisticated parties). Our Supreme Court in Saunders Real Estate declined to find a lease provision unenforceable as contrary to public policy when it "was not a case in which defendants were forced into a contract of adhesion, offered on a take-it-or-leave-it basis; rather, the leases of individual tenants were the result of initial proposals by plaintiff, subject to negotiation, resulting in different terms for the various tenants." Id. Thus, although not dictated by precedent that this jurisdiction will enforce accelerated rent clauses, doing so seems to fit with the Rhode Island judiciary's history of enforcing the terms of carefully negotiated contracts between sophisticated parties. See Rodrigues, 926 A.2d at 624; Saunders Real Estate, 769 A.2d at 1281; Scullian, 108 R.I. at 409, 276 A.2d at 279-80.

Where there is a dearth of case law in the State, this Court often looks to other jurisdictions, including Massachusetts, for guidance. In a major and fairly recent case, the Massachusetts Supreme Judicial Court upheld the enforceability of accelerated rent provisions in commercial leases between sophisticated parties. See Cummings Props., LLC v. Nat'l Commc'ns Corp., 869 N.E.2d 617, 620-23 (Mass. 2007). In Massachusetts, like Rhode Island, liquidated damages provisions are enforced so long as they do not constitute a penalty. Id. at 620. "If, at the time the contract was made, actual damages were difficult to ascertain and the sum agreed on by the parties as liquidated damages represents a reasonable forecast of damages expected to occur in the event of a breach, it will usually be enforced." Id. (applying same two-part test for enforceability of liquidated damages clauses as applied by Rhode Island courts).

Specifically, "a rent acceleration clause . . . may constitute an enforceable liquidated damages provision so long as it is not a penalty." Id.

In Cummings, the Supreme Judicial Court noted the "near unanimous trend toward upholding liquidated damages clauses in agreements between sophisticated parties" and indicated that the concern with penalty clauses is "an anachronism" when the contract is between commercial entities.[5] Id. at 621; see Fifty States Mgmt. Corp., 389 N.E.2d at 116 ("In the vast majority of instances . . . these clauses have been enforced at law in accordance with their terms"). In its analysis of the liquidated damages, the Massachusetts court weighed that "at the time the lease was entered into, the parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at that time, or what the cost of finding another tenant and the length of time the property might remain vacant might be." Cummings, 869 N.E.2d at 622. Furthermore, because the accelerated rent represented the agreed rental value of the property for the remainder of the lease, it was "a reasonable anticipation of damages that might accrue from the nonpayment of rent." Id. The Massachusetts court accordingly enforced the award of liquidated damages pursuant to the acceleration clause in the commercial lease. See id. at 623.

Even more recently, the Massachusetts court enforced an acceleration clause in a ten-year contract to purchase club seats for New England Patriots home football games. See NPS, 886 N.E.2d at 672-76. Relying on Cummings, the court decided first that the harm resulting from a potential breach of the contract to purchase tickets was difficult to ascertain because of the

[5] While this Decision concentrates on the Massachusetts case law, it is important to consider that a number of other states follow the same approach as Massachusetts, have enforced accelerated rent provisions, and are relied upon by Massachusetts and other states in their decisions. See Cummings, 869 N.E.2d at 620-21 (citing cases in New Jersey, New York, Pennsylvania); Aurora Bus. Park Assocs., LP v. Michael Albert, Inc., 548 N.W.2d 153, 155 (Iowa 1996) (citing cases in Delaware, Louisiana, Ohio, Utah).

varying demand for luxury season tickets (tied to performance of the team and other factors) and because there was no ability to predict how long it would take to resell the seats. Id. at 674. Second, the court determined the acceleration clause damages bore a reasonable relationship to the anticipated actual damages because the breaching party was "required to pay no more than the total amount he would have paid had he performed his obligations under the agreement." Id. at 675. Therefore, the court enforced the acceleration clause and held the purchaser liable for the remainder due under the agreement. See id. at 674-76.

This Court is persuaded by the analogous and applicable reasoning of the Massachusetts courts and convinced that in this case, the accelerated rent provisions are enforceable and are not punitive liquidated damages. Where, as here, the amount of damages was difficult to ascertain at the time the contract was made and the amount of damages set by the provision is a reasonable forecast of the potential damages in the event of a breach, the liquidated damages provision—or acceleration clause—will be enforced. See Psaty & Furhman, 76 R.I. at 98, 68 A.2d at 38; Muirhead, 72 R.I. at 173, 48 A.2d at 419; Cummings, 869 N.E.2d at 620.

At the time of drafting the Lease, the parties had no way of knowing when or how 20/20 Communications would breach the Lease, or if Omni would be able to re-let the premises. See NPS, 886 N.E.2d at 674 (determining damages difficult to ascertain because of varying demand for luxury season tickets and no ability to predict the length of time to resell the seats); Cummings, 869 N.E.2d at 622 (determining damages difficult to ascertain when "parties could not have foreseen when in the lease term a breach for nonpayment of rent would occur, what the commercial rental market would be at the time, or what the cost of finding another tenant and the length of time the property might remain vacant might be"). The Lease between Omni and 20/20 Communications was for a period of three years, at any time during which 20/20

Communications could have breached the Lease. (Lease 1.) Further, the Lease was for 2100 square feet of downtown office space, the demand for which could easily fluctuate. See id. In fact, Omni—at least at the time of filing its Affidavit—has still not been able to re-let the space, despite diligent efforts. See Shelzi Aff. ¶¶ 12-13. The facts here present many of the same reasons that led the Massachusetts courts in Cummings and NPS to enforce the accelerated rent provisions. See NPS, 886 N.E.2d at 674 (considering varying demand for tickets and uncertainty in reselling them); Cummings, 869 N.E.2d at 622 (considering unforseeability of commercial rental market conditions and length property would remain vacant). It is clear to this Court that here, likewise, the damages for a potential breach could not readily be ascertained at the time the parties entered into the Lease.

Secondly, the accelerated rent clauses provided a reasonable forecast of the damages in the event of a breach. See NPS, 886 N.E.2d at 675 (ruling acceleration clause reasonably related to anticipated damages because breaching party "required to pay no more than the total amount he would have paid had he performed his obligations under the agreement"); Cummings, 869 N.E.2d at 622 (ruling accelerated rent clause representing the agreed rental value for the remainder of the lease to be "a reasonable anticipation of damages that might accrue from the nonpayment of rent"). The accelerated rent provision does not require 20/20 Communications to pay any more than if it had performed its full obligations under the Lease. See NPS, 886 N.E.2d at 675. Rent due under Lease represents reasonable forecast of the potential damages for a future breach of the Lease, particularly in light of the uncertainty of finding a replacement tenant. See Cummings, 869 N.E.2d at 622.

Application of the Massachusetts case law is consistent with Rhode Island's enforcement of acceleration clauses and liquidated damage provisions in other contexts. See Patriarca, 502

A.2d at 337-39 (awarding damages provided by acceleration clause in mortgage note on summary judgment); Muirhead, 72 R.I. at 173, 48 A.2d at 419 (providing State standard for enforcement of liquidated damage provisions). Specifically, Rhode Island courts will not "rewrite the contract" when the language and assent of the parties is clear. See Scullian, 108 R.I. at 409, 276 A.2d at 279-80 (enforcing acceleration clause in sales contract based on clear intent of parties that full amount would become due upon default). Lease agreements such as the Lease in the case at bar are to be applied as written when unambiguous and when there is no evidence of fraud or duress. See Sophie F. Bronowiski Mulligan Irrevocable Trust, 2012 WL 1187727 at * 4-5.

Here, it is important to emphasize the sophistication of both Omni and 20/20 Communications and enforce the Lease provisions as intended and drafted by them. See Wholey Boiler Works, 45 R.I. 441, 123 A. at 598 (stating duty of court to give contract construction intended by parties in connection with liquidated damages). The Court finds no ambiguity in sections 6.1(b) or 7.4, which plainly provide for the acceleration of rent upon default. Additionally, 20/20 Communications has not come forth with any evidence suggesting fraud, duress, or similar conditions. See Hill, 11 A.3d at 113 (requiring non-moving party on summary judgment to prove existence of disputed facts by competent evidence). To the contrary, 20/20 Communications acknowledges that it is a sophisticated party who enters many similar leases across the country and even directly negotiated some of the terms of this very Lease. See Pl.'s Mot. for Summ. J. Ex. 3 (Gross Dep.) at 5:4-9, 12:6-13:6; Gross Aff. ¶ 2. The acceleration clause was not boilerplate language buried in a contract of adhesion, but instead, was contained in two provisions of a carefully negotiated commercial lease between sophisticated parties. See

Saunders Real Estate, 769 A.2d at 1281 (enforcing lease provision party argued was contrary to public policy because lease was not adhesion contract and was negotiated by parties).

Therefore, the Court denies 20/20 Communications' motion for partial summary judgment. The acceleration clauses, under the facts presented in this case, are valid and enforceable under Rhode Island law.

B

Breach of Lease

As the Court has determined that the accelerated rent provisions are enforceable and the Court has denied 20/20 Communications' motion for partial summary judgment, it remains to be determined whether Omni is entitled to summary judgment on its breach of contract claim. Omni contends that 20/20 Communications did not effectuate Early Termination of the Lease and, as a result, breached the Lease by failing to pay rent in accordance with its terms and by vacating the premises in violation of the Lease provisions. 20/20 Communications objects by arguing that Omni terminated the Lease or that Omni acted in bad faith, excusing 20/20 Communications performance.

1

Early Termination

20/20 Communications first contends that its Early Termination of the Lease was effective. However, 20/20 Communications has admitted that it did not comply exactly with the terms set forth in the Lease for Early Termination.

The Early Termination provision of the Lease was directly negotiated by the parties, and, in fact, the Early Termination language was included at the request of 20/20 Communications.

See Gross Aff. ¶ 2. The language provides that the Tenant may terminate the Lease early so long as Tenant does not occupy other office space within forty miles or default under a material term of the Lease. See Lease § 1.3. Furthermore, to effectuate Early Termination, the Tenant must give notice at least sixty days prior to the intended termination date, which notice will not be effective unless accompanied by a check for the termination fee, as determined by a straightforward formula based on the days remaining in the Lease term. See id.

It is undisputed here that 20/20 Communications did not comply with the conditions of the Early Termination provision by, at minimum, not sending notice "accompanied by a check for the sum of Seven Thousand and 00/100 Dollars ($7,000.00) reduced by Nine and 59/100 Dollars ($9.59) for each day less than Seven Hundred Thirty Days (years 2 and 3 of the Lease) that the balance of the Lease Term will be reduced." Lease § 1.3; see Pl.'s Mot. for Summ. J. Ex. 4 (Def.'s Resp. to Pl.'s First Req. for Admis.) at ¶¶ 106-08. Additionally, Defendant has failed to present any admissible evidence verifying that it sent the notice via certified mail, return receipt requested, as required by the Lease. See Lease § 7.2; Hill, 11 A.3d at 113 (stating responsibility of non-moving party on summary judgment to come forward with admissible evidence creating dispute of fact).

Despite 20/20 Communications' averments that it intended to comply with the provision and that it was ready, willing, and able to pay the termination fee, the facts are undisputed that it did not do so. The agreement between the parties provides that ". . . notice shall not be effective unless accompanied by a check . . . ." (Lease § 1.3.) Accordingly, this Court determines, as a matter of law based on the undisputed facts, that 20/20 Communications did not comply with the conditions set forth in the provision. 20/20 Communications did not effectuate Early Termination of the Lease.

2

Breach by Failing to Pay Rent and Vacating Premises

Omni moves for summary judgment on Count I of its Complaint, alleging breach of contract because 20/20 Communications vacated the leased premises and failed to pay rent and accelerated rent. 20/20 Communications opposes Omni's Motion, primarily arguing that Omni acted in bad faith, excusing 20/20 Communications' performance under the Lease. There is no dispute by the parties that the Lease is the controlling agreement in this case, and 20/20 Communications does not dispute the relevant provisions of the Lease.[6]

It is a longstanding rule that "parties are bound by the plain terms of their contract." Vincent Co. v. First Nat'l Supermarkets, Inc., 683 A.2d 361, 363 (R.I. 1996) (citations omitted); see Samos, 811 A.2d at 643 ("In construing a lease, the intention of the parties must be ascertained from the language employed in the lease"); see also Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007) (stating party who signs contract cannot later claim he/she did not understand its terms). When a contract is unambiguous, outside evidence of the intent of the parties is irrelevant. See Samos, 811 A.2d at 643; Vincent Co., 683 A.2d at 363. While breach of contract is generally a question of fact, when the issue of whether there was a material breach "admits of only one reasonable answer, then the court should intervene and resolve the matter as a question of law." Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010) (quoting Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 158 (R.I. 2001)) (resolving breach of contract question as matter of law when only one reasonable disposition).

[6] 20/20 Communications did dispute the acceleration clauses, as addressed supra part III(A), as well as compliance with the Early Termination provision, discussed supra part III(B)(1). 20/20 Communications' objection to Omni's motion for summary judgment, however, does not raise any other arguments contesting additional language or provisions of the Lease.

Further, it is clear to the Court that failure to pay rent pursuant to the terms of a commercial lease constitutes a material breach of the lease contract. See Saunders Real Estate Corp., 769 A.2d at 1280-81 (upholding award for breach of commercial lease when tenant vacated premises and failed to pay rent). Voluntary surrender of the leased premises prior to the expiration of the lease, without prior agreement and notice, does not relieve a tenant of its obligations to pay rent under the lease, and failure to pay remains a breach of the lease. See Czech v. Zuromski, 83 R.I. 129, 136, 117 A.2d 431, 435 (R.I. 1955).

The Lease in this particular case required monthly payment of rent and additional rent. (Lease § 1.4.) It specifically mentions a "Payment Default," requiring no demand to the Tenant and placing the Tenant in default of the Lease. See Lease § 6.1(a). It is undisputed that the Tenant here, 20/20 Communications, has not paid rent since March 2010. See Shelzi Aff. ¶ 11; Def.'s Obj. to Pl's Mot. for Partial Summ. J. 6 (indicating Defendant stopped paying rent after March 2010). Without an effective Early Termination, Tenant owed monthly rent through January 2012.[7] (Lease 1.) The Court finds based on the undisputed facts that 20/20 Communications breached the Lease by failing to timely pay rent and by vacating the premises.

The Lease further provides that if Tenant abandons or vacates the Leased premises, Tenant is in default, and in the event Tenant discontinues operation of business at the premises for twenty days, the Landlord has the option to terminate the Lease and accelerate rent. (Lease §§ 6.1(a), 7.4.) The undisputed evidence in this case, as agreed by 20/20 Communications, is that it vacated the premises in December 2009, well before the January 2012 expiration of the

[7] Defendant argues that Omni's March 9, 2010 communication declaring 20/20 Communications in default and seeking accelerated rent payments terminated the Lease and relieved 20/20 Communications of its obligation to pay rent. The Court is not swayed by this argument. If in fact Tenant was in default, thus accelerating rent and terminating the Lease, then Tenant undeniably owes the amount of the accelerated rent; Tenant is in fact obligated to pay rent, not relieved of paying any rent if the Lease were terminated due to their alleged default.

Lease. See Pl.'s Mot. for Summ. J. Ex. 4 (Def.'s Resp. to Pl.'s First Req. for Admis.) at ¶ 113, Ex. 5 (Def.'s Ans. to Interrogs. Propounded by Pl.) at ¶ 12. This, along with non-payment of rent, rendered 20/20 Communications in default of the Lease, in light of its failed attempt to exercise Early Termination. As a matter of law, 20/20 Communications, by vacating the premises and ceasing to pay rent, breached the clear and unambiguous language of the commercial Lease it entered. See Samos, 811 A.2d at 643 (stating unambiguous lease construed and enforced pursuant to its plain language); Lease §§ 1.4, 6.1(a), 7.4 (providing default for untimely payment of rent and for vacating premises).

The Court would be remiss if it did not address 20/20 Communications' primary argument in opposition to Omni's motion for summary judgment. 20/20 Communications contends that Omni acted in bad faith by refusing the provide 20/20 Communications with a calculation of the termination fee owed under the formula set forth in the Lease section for Early Termination. 20/20 Communications argues this alleged bad faith and breach of good faith and fair dealing excuses 20/20 Communications' performance under the Lease.

Undoubtedly, a material breach of a contract by one party may excuse the non-breaching party from subsequent performance of its obligations under the contract. See Parker, 996 A.2d at 633 (citing Women's Dev. Corp., 764 A.2d at 158). This State recognizes an implied covenant of good faith and fair dealing in virtually every contract. See Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002); Ide Farm & Stable, Inc. v. Cardi, 110 R.I. 735, 739, 297 A.2d 643, 645 (1972). It is further evident that the duty of good faith and fair dealing provides that a party cannot escape liability on a contractual obligation by preventing the happening of a condition or taking advantage of an obstacle to performance—such action constitutes a breach of the covenant. See Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GMBH,

765 A.2d 1226, 1237-38 (R.I. 2001) (citations omitted) (ruling breach of good faith and fair dealing in preventing and frustrating grant of DEM order of approval, a condition precedent in the contract).

The undisputed facts in support of Defendant's argument that Omni breached its duty of good faith and fair dealing are simply that Omni failed to respond to one or more inquiries regarding the calculation of the termination fee and instead declared default after 20/20 Communications vacated the office space. However, the method for calculating the termination fee is set forth in the Lease in no uncertain terms. (Lease § 1.3.) 20/20 Communications in fact negotiated that provision of the Lease and insisted on its inclusion. See Pl.'s Mot. for Summ. J. Ex. 3 (Gross Dep.) at 9:23-10:1, 12:6-13:6; Gross Aff. ¶ 2. Either party could have calculated the amount due with the notice of Early Termination. There is no language obligating Omni to calculate the termination fee; rather, the Lease provision explicitly lays out the method to calculate the fee so that the Tenant, 20/20 Communications, could send a check for the termination fee accompanying its Early Termination notice. (Lease § 1.3.)

It is apparent here that no trier of fact could reasonably find Omni violated its duty of good faith and fair dealing in such a way as to constitute a material breach of the Lease agreement excusing 20/20 Communications' performance. See Parker, 996 A.2d at 632 (holding where only one reasonable answer whether a material breach, court should intervene and rule as matter of law). While the Court believes both parties could have engaged in a more diligent effort to not only calculate the termination fee, but also work out an agreement for effective Early Termination of the Lease, Omni's lack of response to notice that there is no evidence it even received does not rise to the level of a breach of good faith and fair dealing. Moreover,

Omni's actions surely do not rise to the level of a material breach that would excuse 20/20 Communications' performance pursuant to the Lease. See Parker, 996 A.2d at 633.

3

Damages

Omni has proved to the satisfaction of the Court that it suffered damages as the result of 20/20 Communications breach of the Lease. At the time of the filing of its Motion, Omni's damages totaled at least $40,903.40. See Shelzi Aff. ¶ 4. The Court is aware that number represented Omni's claimed damages through January 31, 2011. See id. at ¶¶ 3-9.

Pursuant to the terms of the Lease, Omni is entitled to damages in an amount to be determined, including rent and additional rent for the entire Lease term, late fees after March 2010, and attorneys' fees and expenses. See Lease §§ 1.6, 6.1(b), 6.3, 7.4. Omni shall submit to the Court an Affidavit for final determination of the appropriate amount in damages. In the event of dispute, the amount of damages will be determined in a manner consistent with appropriate practice.

IV

Conclusion

After due consideration, the Court denies 20/20 Communications' motion for partial summary judgment on damages but grants Omni's motion for partial summary judgment on Count I of its Complaint for breach of contract. The acceleration clause providing for the remainder of rent owed in the Lease term to become due and payable upon default of the Lease between sophisticated commercial entities does not constitute an unenforceable penalty. 20/20 Communications breached the Lease by failing to comply with the Early Termination provision, and thus, defaulted on the Lease by vacating the premises and failing to pay rent. Prevailing counsel shall present an Order consistent herewith which shall be settled after due notice to counsel of record.