SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

1600 CAPITAL ASSOCIATES, LLC,	:	
	:	
Plaintiff,	:	
	:	**Case Nos. 2008 CA 003422 B;**
	:	**2009 LTB 16122**
v.	:	
	:	**Judge Retchin**
TODD ENGLISH, *et al.*,	:	**Calendar 14**
	:	
	:	
Defendants.	:	

MEMORANDUM OPINION
(July 2, 2009)

On March 5, 2009, the Court granted summary judgment to plaintiff and set this matter for a hearing to determine the amount of damages to which plaintiff is entitled.[1] In this civil action, plaintiff is the landlord and defendants are the guarantors of the commercial lease.[2] The Court took testimony on May 27, 2008 and June 22, 2008, and credited the testimony of all the witnesses. Based on a consideration of the testimony and the exhibits, the Court finds the tenant is in default on its lease for failing to pay rents due under the lease. The Court also finds that through the end of the third week of June, 2009, the tenant owes $4,476,156.70.[3]

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[1] The long-term relationship between the parties has been set out in the Court's summary-judgment order. Suffice it to say the parties have a complex commercial lease with eight amendments.

[2] On July 1, 2009, the Court ruled in the consolidated L&T case, 2009 LTB 16122, that plaintiff was entitled to possession due to tenant's failure to pay the rent due. Although plaintiff had sought a non-redeemable judgment, the Court concluded the tenant does have the right to redeem the tenancy by paying all amounts due. *Trans-Lux Radio City Corp. v. Serv. Parking Corp.*, 54 A.2d 144 (D.C. 1947).

[3] This amount is comprised of $658,039.68 in non-default rent, $636,810.66 in total "landlord forgiveness," and $3,181,306.40 in rent forgiveness. Pl.'s Exs. 13, 32. This sum does not include a replenishment of the security deposit because plaintiff has sought possession. Additionally, this sum does not include legal fees

The Court next determines whether Todd English is entitled to an "erosion" of his guaranty.[4] The guaranty is addressed in the Seventh Amendment to the lease, Pl.'s Ex. 1, the Guaranty, Pl.'s Ex. 2, and the First Amendment to the Guaranty. Pl.'s Ex. 2.

On October 20, 2005, the parties executed the Seventh Amendment to the lease and the First Amendment to the original guaranty. These documents provide that Todd English's personal guaranty is limited to $813,000 with the possibility of a reduction in the amount of the guaranty over time. Specifically, section 3A of the First Amendment to his guaranty provides:

> From and after the date hereof [October 20, 2005], the liability of the Guarantor for such Guaranteed Obligations shall not exceed the maximum amount of $813,000 in the aggregate, and shall reduce on an annual calendar year basis on December 31, 2005 until reduced to $0 as follows:
>
> (i) by the sum of the Additional Security Deposit, Legal Fees and Tenant Improvement Allowance repaid during such year, but excluding interest paid on such funds;[5]
>
> (ii) so long as Tenant has not allowed existing more than one monetary default in any calendar year under the Lease, and provided further that there is no default in existence on such date, by the sum of $50,000.

Contemporaneously with executing the above amendment to the guaranty, the parties executed the Seventh Amendment to the lease. The Seventh Amendment to the lease also addressed the guaranty. Paragraph 10 of the Seventh Amendment provides:

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and costs to which the landlord is entitled. Pursuant to Paragraph 12 of the guaranty, "Guarantor shall pay to Landlord all costs and expenses, including reasonable attorneys' fees and the court costs . . . incurred by the Landlord in enforcing this Guaranty." Indeed, all of the guaranties provide for attorneys' fees. Pl.'s Exs. 3–4.

[4] The parties agree there is no cap on the Olives Group guaranty, and that it has no "erosion" provision. Pl.'s Ex. 4. They also agree there is a $450,000 cap on the Olives Associates guaranty, and that it has no "erosion" provision. Pl.'s Ex. 3.

[5] The First Amendment increased Todd English's personal guaranty from $400,000 to $813,000 and was increased to reflect $370,000 the landlord loaned to the tenant for improvement to the property, $35,000 for an increase in the security deposit, and $8000 in legal fees the tenant agreed to pay.

(c) . . . provided that for each year in which Tenant has not permitted a default to exist, the amount of the Todd English guaranty shall be reduced by the amount of the Additional Security Deposit, Legal Fees and Tenant Improvement Allowance . . . as has been repaid during such year. Following execution of the Amendment to the Todd English Guaranty, the Todd English Guaranty shall be for the maximum amount of $813,000.

(d) In addition to the modifications to the Todd English Guaranty set forth in Section 10(c) of this Amendment, and provided that Tenant has not allowed to exist more than one monetary default in any calendar year, and provided further that there is no default in existence as of such date, on December 31 of such year Landlord shall reduce the amount of the Todd English Guaranty by $50,000.

The language in the First Amendment to the Guaranty does not parallel the language in the Seventh Amendment. Mr. English argues the Court should interpret the First Amendment to the guaranty to mean he is entitled to an erosion of his guaranty on a yearly basis by the amount the tenant has paid for the additional security deposit, legal fees and tenant improvement allowance *whether or not the tenant was in default.* Additionally, he contends he is entitled to a $50,000 reduction in his guaranty for 2005, because the tenant did not default between the date of the Seventh Amendment on October 20, 2005 and December 31, 2005.

On the other hand, plaintiff contends there should be no erosion of the guaranty, because Mr. English is entitled to a reduction in his guaranty for the additional monies paid for security deposit, legal fees and tenant improvement allowance *only if the tenant did not default during the year, and to a $50,000 reduction only if the tenant did not have more than one monetary default in the calendar year and only if the tenant was not in default on December 31 of each year.* Plaintiff further contends the First Amendment to the Todd English Guaranty does not entitle Mr. English to a $50,000 reduction in his guaranty for the period October 21 through December 31, 2005, because a calendar year

had not yet transpired from the date the parties signed the First Amendment to guaranty on October 20, 2005.

Where there is ambiguity in contemporaneously executed documents, the Court may look at extraneous evidence to find the intent of the parties. *Christacos v. Blackie's House of Beef*, 583 A.2d 191, 194 (D.C. 1990). Based on the testimony and the exhibits presented, the Court finds any inconsistency in the provisions was not intentional, and was instead merely a drafting error, and that the parties intended to be bound by the language in Paragraph 10 of the Seventh Amendment for two reasons.

First, in reviewing the correspondence between the lawyers who prepared the documents, it is clear Mr. English's counsel was satisfied with the guaranty language in paragraphs 10(c) and (d) of the Seventh Amendment. Pl.'s Ex. 12. Indeed, on September 26, 2005, Elizabeth Ross, defendants' counsel, sent an email to plaintiff's counsel stating, "I also attach a mark-up of the First Amendment to Guaranty, which needs to be revised to be consistent with Section 10(e) of the Seventh Amendment." Attached to her email is a PDF document with her handwritten edits. These edits confirm it was her intent (and presumably her client's intent) that the First Amendment to the Guaranty "be consistent" with the Seventh Amendment. Given that she made handwritten edits on the First Amendment to the guaranty and no edits to the guaranty provision of the Seventh Amendment, it is clear she (and presumably Mr. English) did not intend to agree to anything other than the guaranty provisions in the Seventh Amendment. Second, plaintiff's principal, Stylianos Christofides, testified it was the landlord's intent to allow an erosion of the guaranty only if there was not more than one monetary default in a year,

and only if the tenant was not in default on December 31. Defendant has offered no contrary evidence.

Nonetheless, defendant asks the Court to hold this drafting error against plaintiff because plaintiff drafted the document. *See Capital City Mortgage v. Habana Village Art*, 747 A.2d 564 (D.C. 2000). The Court declines to do so. First, both parties contributed to the construction of the legal documents. More importantly, the Court is able to determine the parties' intent from the testimony and the exhibits, and both parties intended to be bound by the Seventh Amendment. Simply put, Mr. English is not entitled to benefit from a mere drafting error when the result would be contrary to the intent of the parties. Because the Court finds the language from the Seventh Amendment trumps the language in the First Amendment to the Guaranty, the Court next determines whether Mr. English is entitled to an erosion of his personal guaranty under the Seventh Amendment.

Mr. English contends he is entitled to a $50,000 reduction in his guaranty because there was no default between October 20, 2005 and December 31, 2005. The Court credited the testimony of Mr. Christofides that it was plaintiff's intent that the parties operate under the new amendment for a "calendar year" before Mr. English would be entitled to a $50,000 erosion of his guaranty. As Mr. Christofides explained, the tenant had paid its rent late on many occasions; so the erosion provision was intended as a "carrot" for timely payment of rent for a calendar year.[6] Additionally, defendants' counsel conceded as much in defendants' opposition to plaintiff's motion for summary judgment. In that opposition, counsel claimed Mr. English was entitled to a "$50,000

[6] The tenant consistently had difficulty paying the rent. Indeed, Paragraph 2 of the First Amendment to Todd English's Guaranty provides: "English acknowledges and confirms that since the making of the Guaranty, an event of default by Tenant has occurred under the Lease in each consecutive twelve (12) month period since March 15, 2003."

reduction in each of 2006 and 2007," implicitly acknowledging Mr. English would not be entitled to a yearly reduction of $50,000 in 2005 for an approximate eight-week period. Even if a guaranty erosion for 2005 were theoretically possible, Mr. English would not be entitled to it because he acknowledged in paragraph 2 of the Seventh Amendment to the lease that tenant was in default for failing to make four categories of payments in 2005. By his own admission therefore, tenant was in default more than once during calendar-year 2005.

Similarly, the Court finds the tenant had uncured defaults at the end of each calendar year for 2006, 2007, and 2008, thereby precluding any erosion of the guaranty based on repayment of the additional security deposit, legal fees, or tenant improvement allowance or based on the $50,000 yearly reduction.[7] Mr. Christofides testified the tenant regularly failed to pay rent on time, and the tenant was in default at the end of each calendar year. His testimony was corroborated by the exhibits.

The Court is not persuaded by defendants' argument that notice of the defaults was deficient. The letters in Pl.'s Exs. 5–10 show ten letters to the tenant or Mr. English providing notice of the tenant's defaults. Defendants challenge the legal sufficiency of these default notices, contending they do not comply with the notice-of-default requirements per Paragraph 19 of the Lease. Paragraph 19 required default notices to be sent by "national prepaid overnight delivery service." Pl.'s Ex. 1 at 43. The Court is satisfied that all of the notices were sent via Federal Express except the December 2007 letter, which was only sent by facsimile. Although the December 2007 letter, Pl.'s Ex. 6, was not sent by Federal Express, the January 17, 2007 letter, Pl.'s Ex. 7, which was sent

[7] Mr. Chorney, the tenant's chief financial officer, testified the tenant made no payments for tenant improvements, legal fees or security deposit in 2005.

by Federal Express, informs the tenant that rent for December 2007 and January 2008 had not been paid. Thus, the tenant was provided written notice of the default for 2007 in January 2008 consistent with Paragraph 19.[8]

Defendant also argues plaintiff failed to mitigate damages because plaintiff refused an offer of judgment made on June 5, 2008. Defendants' argument is without merit for two reasons. First, defendants' offer was less than its full debt. Moreover, defendants have provided no legal authority for the proposition that a plaintiff's failure to accept an offer of judgment should be considered on the subject of mitigation.

Judith E. Retchin
Associate Judge

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[8] Paragraph 2 of Mr. English's guaranty provides, "Guarantor waives notice of any breach or default by tenant."