NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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4110 Chain Bridge Road
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703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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September 26, 2017

LETTER OPINION

Mr. Eli Jason S. Mackey, Esq.
Setliff & Holland, P.C.
4940 Dominion Boulevard
Glen Allen, VA 23060
Counsel for Plaintiff GBG Inc.

Mr. Matthew Marc Moore, Esq.
Shulman, Rogers, Gandal, Pordy & Ecker P.A.
12505 Park Potomac Avenue, 6th Floor
Potomac, MD 20854
Counsel for Defendant Seven Corners Shopping Center Falls Church L.P.

Re: *GBG Inc. vs. Seven Corners Shopping Center Falls Church L.P.*
Case No. CL-2016-14040

Dear Counsel:

This matter came before the Court on September 22, 2017, on consideration of the Plaintiff's Motion for Summary Judgment, under the unusual circumstance the parties apparently agreed there was no genuine issue of material fact in dispute, and that this of necessity meant either of them must prevail as a matter of law before reaching trial on their Declaratory Judgment action. Having considered the arguments of

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counsel, the Court, by means of an Order, rejected such legal position of both parties in application of the facts, and therefore DENIED the Plaintiff's Motion for Summary Judgment. The parties who well-argued their respective positions, respectfully requested the Court set out its thinking underlying the Order in writing as already announced orally for further use in this cause, a reasonable request which is granted by the issuance of this Letter Opinion.

FACTS

On February 1, 2006, the Defendant executed a Deed of Lease (the "Lease") with Fitness First of Seven Corners, LLC. The Lease provided for Fitness First to lease a commercial space in Defendant's Seven Corners Shopping Center located in Fairfax, Virginia. In 2013, Fitness First assigned the Lease to GBG.

In August 2014, Seven Corners applied to the Fairfax County Planning and Zoning Board for a special exception in connection with the replacement of the signs. At that time, Seven Corners described the new signs as an "upgrade and improvement" to the shopping center. Amongst other changes, Seven Comers sought approval from the County to increase the height of the pylon sign to 30 feet. In February 2016, Seven Comers installed a new pylon sign and monument sign at the entrance to the Seven Comers Shopping Center. The total budget for the new signs was approximately $114,027.00.

Alan Ripley, the Director of Operations for First Allied Corporation, oversaw the installation of the pylon sign and monument sign that are the subject of this litigation. In

February 2016, Alan Ripley received an invoice from ImageWorks for the cost of the new monument sign and pylon sign. On behalf of Seven Corners, Mr. Ripley objected to the inclusion of sales tax on the invoice for the monument sign and pylon sign. Mr. Ripley stated that the monument sign and the pylon sign, and all of their components, were "capital improvements to the real property." ImageWorks ultimately agreed with Mr. Ripley's position and removed the sales tax from the invoice. Seven Corners capitalized the cost of the monument sign and pylon sign as capital improvements to the property.

On August 16, 2016, Seven Corners notified GBG and the other tenants that they would be charged for their proportionate share of the cost of the new signs. Seven Corners relied on Section 11.02 of the Lease to charge GBG for is proportionate share of the costs of the new signs. The parties exchanged correspondence on this issue, but were unable to agree on the interpretation of the Lease or Defendant's right to charge the costs of the pylon sign and monument sign to the tenants.

ARGUMENTS OF THE PARTIES

Plaintiff's Argument:

Plaintiff argued that the Motion for Summary Judgment should be sustained for two main reasons: 1) the cost of the signs is specifically excluded from common charges under the Lease; and 2) the cost of the signs does not fall within the exception to Exclusion No. 29.

First, Plaintiff argued the cost of the signs is excluded from Common Charges under the Lease. Plaintiff emphasizes that Defendant admits the new signs were "capital investments" to the property and that it capitalized the expense of the signs. Plaintiff pointed to section 11.02 of the Lease:

> Notwithstanding the foregoing or any other provision in this Lease to the contrary, the following shall be at all times excluded from the term "Common Charges" and rent generally:
>
> > (xxix) costs which under GAAP [generally accepted accounting principles] are capitalized (other than costs expressly included as Common Charges above in this Section 11.02)...

(Pl.'s Mot. 4) (Plaintiff referred to this provision as "Exclusion No. 29"). Plaintiff argued this section expressly excludes these costs from the definition of Common Charges.

Second, Plaintiff argued the cost of the signs does not fall into the exception to Exclusion No. 29. (Pl.'s Mot. 4) ("other than costs expressly included as Common Charges above in this Section 11.02"). Plaintiff argued that in order for this exception to apply, the cost of the new signs would have to be "expressly included" as Common Charges in Section 11.02. Item (i) of the items enumerated, and which are expressly included in the term Common Charges, reads as follows:

> The maintenance, repair and replacement of all exterior walls and other structural and exterior portions of the Shopping Center curbs, gutters, sidewalks, pylons and signs, drainage and irrigation ditches, conduits and pipes, utility systems, sewage disposal or treatment systems, public toilets and sound systems within the Shopping Center.

Plaintiff stated that Defendant's argument is that the costs of the signs are Common Area Maintenance because they constitute "maintenance, repair and

replacement of . . . pylons and signs." Plaintiff argued that the ordinary meanings of these terms do not support Defendant's argument. Plaintiff broke this argument down into five components: 1) these terms do not include expenditures for capital improvements; 2) these terms refer to activities necessary to keep the center in good operating condition; 3) the argument that these terms are limited to activities necessary to keep the center in good operating conditions is supported by other terms in the Lease; 4) the inclusion of other specific capital expenditures supports the conclusion that capital expenditures for improving the property are not included as Common Charges; and 5) the general introductory language of Section 11.02 does not trump or expand the specific language that follows.

First, Plaintiff focused on the definitions of the words "maintenance," "repair," and "replacement." The Black's Law Dictionary definition of "maintenance" is "the upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose." BLACK'S LAW DICTIONARY 953 (6th ed. 1990). The cost of the signs was not incurred in order to preserve the condition of the signs. Furthermore, with respect to assets, maintenance means "expenditures undertaken to preserve an asset's service potential for its originally intended life, these expenditures are treated as periodic expenses or product costs. Contrast with Improvement." BLACK'S LAW DICTIONARY 953 (6th ed. 1990). Plaintiff emphasized that the term "maintenance" is contrasted with the term "improvement." Improvement is defined as a "valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to

more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes . . . such expenditures are capitalized as part of the asset's costs." BLACK'S LAW DICTIONARY 757 (6th ed. 1990).

Plaintiff argued that the signs were improvements because Alan Ripley stated the signs were "capital improvements to the real property." The costs were capitalized improvements and not maintenance costs. Plaintiff alleged there is a lack of evidence that there was an imperfection with the original signs, and the signs were not restored to their original condition. Moreover, Plaintiff noted, Black's Law Dictionary notes that "[i]n accounting, repairs are chargeable to current income whereas an improvement is a capital expenditure which requires depreciation over the life of the improvement." BLACK'S LAW DICTIONARY 1298 (6th ed. 1990). Additionally, "replacement cost" is defined as "[t]he present cost of replacing the improvement with one having the same utility. Cost of replacing lost, stolen or destroyed property to its former use and value." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990). Plaintiff averred Defendant did not replace the signs, because they were not lost, stolen, or destroyed.

Second, Plaintiff agued the terms "maintenance," "repair," and "replacement" refer to activities needed to keep the center in good operating condition. The Lease should be read as a whole. The terms at issue are used throughout the Lease and the use of the terms shows that they "refer to the required and necessary steps to keep the shopping center in good working order." (Pl.'s Mot. 7). Plaintiff cited to Section 13.01 of

the Lease which uses the terms in reference to the tenant's "fit-out." The "fit-out" process is the process of making the interior space suitable for occupation. This section uses the terms to refer to activities that are necessary to keep equipment in good operating condition.

Third, Plaintiff contended other terms in the Lease support the argument that the terms "maintenance," "repair" and "replacement" are limited to activities necessary to keep the center in working order. Specifically, Plaintiff cited to Section 13.02 of the Lease, which defines the landlord's duty to maintain the property. This Section describes the landlord's right to assess Common Charges based on the responsibility to "maintain and keep in good repair" the common areas. Plaintiff contended the landlord does not have free reign to make upgrades at the expense of the tenants.

Fourth, Plaintiff reasoned the inclusion of specific capital expenditures supports the conclusion that capital expenditures for improving the property are not included as Common Charges. Specifically, Section 11.02 (xvii) includes as Common Charges capital expenditures incurred in order to comply with new laws. In turn, Plaintiff concluded that other capital expenditures are subject to Exclusion No. 29, and are therefore, not included as Common Charges.

Lastly, Plaintiff contended that the general introductory language of Section 11.02 does not trump the more specific language that follows. In anticipation of Defendant's possible argument, Plaintiff argued that the rules of contract construction apply. Specifically, the *ejusdem generis* rule applies, requiring that general words

followed by particular words are to be read in accordance with the particular words. The introductory language provides:

> Except as otherwise expressly provided below in this Section 11.02, "Common charges" shall mean all costs and expenses incurred by Owner arising from or in connection with or as a result of the operating, equipping, policing, protecting, lighting, heating, air conditioning, providing sanitation, sewer, fire protection and other services, improving, insuring, maintaining, repairing and replacing the common areas and, all buildings, and improvements within and exclusive serving the Shopping Center.

This language is followed by more specific language, which enumerates the Common Charges of "[t]he maintenance, repair and replacement of...pylons and signs...within the Shopping Center." (Pl.'s Mot. 11). The general words are restricted by the specific enumerations. Plaintiff cited *Richard Ice Company*, a case in which the lease at issue also contained general language followed by specifically enumerated language. *Richard Ice Co. v. Crystal Ice Co.*, 99 Va. 239, 244, 37 S.E. 851, 853 (1901). The court in that case narrowed the general language in accordance with the more specific language that followed it; and therefore, narrowed the lessees' responsibility to pay rent after a major disaster destroyed the building.

Defendant's Response:

Defendant agreed with Plaintiff's recitation of the facts and conceded that there is no dispute as to the facts of this case.

Defendant had three main arguments: 1) the Lease allows Defendant to assess costs for the improvement and/or replacement of the signs to Plaintiff on a pro rata basis; 2) the rule of *ejusdem generis* cannot be applied to section 11.02; and 3) the

costs for the replacement of the signs are not excluded because Defendant capitalized them under GAAP.

First, Defendant argued Section 11.02 of the Lease allows Defendant to charge Plaintiff their pro rata share. Under this Section, Plaintiff has agreed to pay its share of common area expenses for improvements and replacements. Defendant has both improved and replaced the signs. Both parties relied on *Berry v. Klinger*, which states that the language in a lease is to be given its plain and ordinary meaning. *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983). However, Plaintiff's arguments Defendant averred were attempts to convince the Court to give the language in the Lease a different meaning. Defendant further contended that the replacement of the signs is encompassed by either the word "improving" or the word "replacing" because of the words' plain and ordinary meanings.

"Improve" means to increase the value or enhance the appearance of something. BLACK'S LAW DICTIONARY (10th ed. 2014). "Replace" means to "supplant with substitute or equivalent." BLACK'S LAW DICTIONARY (5th ed. 1979). Defendant therefore asserted it is immaterial whether the signs were an improvement to the original signs or were the equivalent. Section 11.02 of the Lease Defendant contended, does not require that an improvement or replacement be necessary. Defendant maintained if that were the Plaintiff's desire, its predecessor should have included express language exempting all improvements and replacements to elements of the common areas. Moreover, there is

no language in the Lease that limits Defendant's ability to charge for improvements or replacement to the common areas.

Next, Defendant contended the doctrine of *ejusdem generis* cannot be applied. The rule is to be used "sparingly and cautiously applied." *Standard Ice Co, Inc. v. Lynchburg Diamond Ice Factory*, 129 Va. 521, 106 S.E. 390, 393 (1921). It is only used to ascertain intent and meaning of the language in issue, and therefore, it can only be used to make an ambiguity clear. Defendant stated that because the parties agree that the Lease is unambiguous, the rule cannot be used. In Virginia, the rule only applies when an item of specific meaning is followed by a word of general import. Moreover, the words "including, but not limited to" are used in Section 11.02 and indicate that the list of Common Charges is not exhaustive or restrictive.

Lastly, Defendant argued the costs incurred in the replacement of the signs are not excluded because they were capitalized. The language in 11.02, Defendant related, is clear and unambiguous. "If the costs for replacement of the signs are included as a common charge in the first paragraph of Section 11.02, then they are an allowable cost regardless of whether the costs were capitalized." (Def.'s Mot. 6).

Plaintiff's Reply:

Plaintiff argued the terms "replacement" and "improvement" have distinct legal meanings. Plaintiff further averred Defendant did not "supplant" the signs "with a substitute or equivalent," as required by the definition of "replace" that Defendant cited. Plaintiff contended that the replacement of the signs is not encompassed by both the

words "improving" or "replacing" because that would mean Defendant could replace the signs with whatever extravagant replacement choices they wished to make.

Plaintiff cited *Thompson v. Gordon*, a case decided by the Illinois Supreme Court. The case dealt with the interpretation of the terms "replacement" and "improvement." *Thompson v. Gordon*, 241 Ill. 2d 428, 349 Ill. Dec. 936, 948 N.E.2d 39 (2011). The Court determined the term "replacement" required defendants to duplicate the existing bridge deck and median. The word "replacement" did not encompass "improvements." The court stated, "[t]o interpret 'replacement' in section 2B to mean 'improvement' would render the word 'replacement' meaningless." *Thompson v. Gordon*, 241 Ill. 2d at 441-42.

Plaintiff maintained that in Virginia, the Court has made a distinction between "improvement" and "replacement" under the statute of repose. *Travelers Indem. Co. v. Simpson Unlimited, Inc.*, 80 Va. Cir. 16, 20 (Fairfax 2010) (replacement of goods that had reached the end of their lifespan was part of the normal upkeep and maintenance of the building). Lastly, Defendant argued that the first sentence in the introductory paragraph to "Section 11.02 allows Seven Corners to charge as common charges only those 'costs and expenses incurred' by Seven Corners." (Pl.'s reply 3). However, the contract identifies Shopping Plaza Management Corporation as the entity responsible for paying the Contractor for the signs. Plaintiff maintained Defendant was not the one who paid for the signs and was not the one who incurred the costs.

ANALYSIS

Summary judgment shall not be entered if any material fact is genuinely in dispute. Va. Sup. Ct. R. 3:20. Summary judgment is intended to allow courts to "bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5, S.E.2d 588, 589 (1954). Nevertheless, the Supreme Court of Virginia has indicated repeatedly that summary judgment is considered a drastic remedy and is strongly disfavored. *Smith v. Smith*, 254 Va. 99, 103, 487 S.E.2d 212, 214 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept as true 'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Klaiber v. Freemason Associates*, 266 Va. 478, 484, 587 S.E.2d 555, 557 (2003). However, when there is no material fact genuinely in dispute, and when the moving party is entitled to judgment as a matter of law, the court shall enter judgment in that party's favor. Va. Sup. Ct. R. 3:20.

Both parties asserted there are no material facts in dispute in this case. The parties were in agreement in regard to the facts. Both parties however asserted, that as a result, each should prevail in regard to Plaintiff's Motion to the exclusion of the other. The Court finds there to be a two part-test in application to this circumstance. The fact the parties agree there is no genuine issue of material fact in dispute does not consequent thereto necessarily mandate the Court enter summary judgment in favor of

either party without further consideration of the law that frames the case in such situations.

The Virginia Supreme Court has held that the "polestar for the construction of a contract is the intention of the contracting parties as expressed by them in the words they have used." *Fillipo v. CSC Assocs. III, L.L.C.*, 262 Va. 48, 64, 547 S.E.2d 216, 226 (2001) (*quoting Ames v. American Nat'l Bank*, 163 Va. 1, 176 S.E. 204 (1934). When the terms of a contract are clear and unambiguous, a court is required to construe the terms according to their plain meaning. *Golding v. Floyd*, 261 Va. 190, 192, 539 S.E.2d 735, 736 (2001) (citations omitted). "The guiding light is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the instrument plainly declares." *Id.* (*quoting W.F. Magann Corp. v. Virginia-Carolina Elec. Works, Inc.*, 203 Va. 259, 264, 123 S.E.2d 377).

The courts give words their plain and ordinary meaning unless they have acquired some special significance or context within the contract. *Heron v. Transportation Cas. Ins. Co.*, 274 Va. 534, 539, 650 S.E.2d 699, 701 (2007). And the courts "construe the contract as a whole without giving emphasis to isolated terms." *American Spirit Ins. Co. v. Owens*, 261 Va. 270, 541 S.E.2d 553 (2001). "[The contract's] provisions are to be harmonized when possible, [and] effect is to be given to every stipulation when it can be reasonably done." *Uniwest Cost., Inc. v. Amtech Elevator Services, Inc.*, 280 Va. 428, 440, 699 S.E.2d 223, 229 (2010), opinion withdrawn in part on rehearing by 281 Va. 509, 714 S.E.2d 560 (2011).

In this case, there is one provision of the lease at issue, namely Section 11.02. The provision reads in part:

> "Common charges" shall mean all costs and expenses incurred by Owner arising from or in connection with or as a result of the operating, equipping, policing, protecting, lighting, heating, air conditioning, providing sanitation, sewer, fire protection and other services improving, insuring, maintaining, repairing and replacing the common areas and, all buildings, and improvements within and exclusively serving the Shopping Center. Common charges shall include, but shall not be limited to, (i) *the maintenance, repair, and replacement of all* roots, exterior walls and other structural and exterior portions of the Shopping Center curbs, gutters, sidewalks, *pylons and signs* . . .
>
> Notwithstanding the foregoing or any other provision in this Lease to the contrary, the following shall be [ ] excluded from the term "Common Charges" . . . (xxix) *costs which under GAAP are capitalized (other than costs expressly included as common charges above in this Section 11.02)...*

Pl.'s Ex. B at 4 (emphasis added). Within this provision, the parties are at odds as to the meanings of the terms "maintaining," "repairing" and "replacing."

Defendant's reading of the provision was that Plaintiff agreed to pay its pro rata share of the costs of the signs, because Defendant has both improved and replaced the signs. Defendant's main argument was that the Lease is clear and unambiguous. Moreover, Section 11.02 clearly states that Common Charges include the replacement of pylons and signs. The term replacement/replacing has an ordinary meaning that is not as narrow as Plaintiff would like it to be. Furthermore, Defendant argued, these costs are not excluded simply because they were capitalized. They fall within the exception to the exclusion that excludes capitalized costs from the term Common Charges.

Plaintiff's reading of the provision was much narrower. The essence of Plaintiff's argument was that the costs are not Common Charges because they were capitalized improvements. Capitalized costs are excluded from the term Common Charges. Additionally, the costs are not included in the enumerated examples of Common Charges, which are listed in the provision. For this reason, they do not fall within the exception that pertains to the Common Charges expressly enumerated in the provision. Plaintiff contended the signs were not replaced due to the need to maintain or repair the original signs. The exception to the exclusion only applies to replacements needed in order to keep the center in good operating condition.

The proper interpretation of a lease is not always a simple determination. However, in order for the Court to grant summary judgment, there must be a clear cut interpretation. In *Cascades North Venture Limited Partnership v. PRC Incorporated*, the parties disagreed about the interpretation of a lease agreement. Specifically, the parties were at odds regarding the lessee's obligation to extend the lease. The Supreme Court of Virginia had to determine whether summary judgment was proper based on the parties' conflicting interpretations. The Court made the following determination:

> Despite these explanations offered by both sides, we do not believe that either interpretation establishes a plain meaning of the disputed provisions. PRC's interpretation fails to explain adequately the inclusion of subsection 29(d) in the lease. Although the subsection may be viewed as a 14-year limitation on the Section 29 requirement that rent must be paid during vacation, which would come into play only if a second five-year renewal were exercised, such a limitation appears to contradict other provisions of Section 29, requiring rent to be paid for space left vacant "during . . . the Renewal Term". . .

> Likewise, Cascades North's explanation does not establish a plain and unambiguous meaning of Section 29. Although Cascades North maintains that the parties intended to create an obligation of 14 years' duration, Cascades North has not explained how the language employed plainly creates such an obligation in light of the fact that the parties did not provide, straightforwardly, for a 14-year lease. . . . the tenant would have "the *option* to renew . . . for one or two additional terms of five years each."
>
> *In sum, neither party has offered a construction of these provisions that could be deemed so clear that it unambiguously excludes the explanation offered by the opponent. Because the meaning of the disputed lease provisions is unclear, the intention of the parties is a material issue in dispute, so that summary judgment was improper. Therefore, we conclude that this action must be remanded for the trial court to receive evidence relevant to the construction of the ambiguous lease provisions.*

Cascades North Venture Ltd. Partnership v. PRC Inc., 249 Va. 574, 581-582, 457 S.E.2d 370, 374-375 (emphasis added).

The parties in this case have two distinct interpretations, and either interpretation could be applied to the Lease. It is not evident that one interpretation is "so clear that it unambiguously excludes the explanation offered by the opponent." The Court could decide Defendant's interpretation is correct and that Defendant replaced the signs in accordance with the plain and ordinary meaning of the word "replace." However, it could also conclude the Plaintiff's narrower interpretation of the word "replace" is appropriate. It does not clearly appear that one of the parties is entitled to judgment *as a matter of law* at this time, within the framework of the case. Accordingly, the Plaintiff is not entitled to summary judgment.

CONCLUSION

Having considered Plaintiff's Motion for Summary Judgment, under the unusual circumstance the parties apparently agree there was no genuine issue of material fact in dispute, and that this of necessity means either of them must prevail as a matter of law before reaching trial, and in consideration of the arguments of counsel, the Court rejected such legal position of both parties and therefore by previous order, DENIED Plaintiff's Motion for Summary Judgment.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER