STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Rutland Unit — Docket No. 264-5-17 Rdcv

Ramshead Trust,
Plaintiff

v.

Green Mountain College,
Defendant

DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment. Plaintiff Ramshead Trust has sued its tenant, Defendant Green Mountain College, for costs of improvements to the water system on the leased property. Plaintiff alleges that Defendant breached the terms of the parties' 2014 lease by increasing the number of residents at the leased property, which resulted in reclassification of the water system and necessitated the improvements. In response, Defendant cross-moved for summary judgment in its favor. For the following reasons, the Court denies both motions for summary judgment.

Background

The Court summarizes the following undisputed facts from the parties' statements of material facts. Plaintiff owns the property formerly known as the Killington Village Inn at 2500 Killington Road, Killington, Vermont (the "Lodge"). In 2005, Defendant entered into an agreement with Plaintiff to lease the Lodge for the purpose of running its school of resort management and to house the students in that program. On April 9, 2014, the parties entered into their current ten-year lease (the "2014 Lease"), with substantially the same terms as their earlier lease.

Under the 2014 Lease, the Defendant was permitted to use the Lodge "for the primary purpose of a student residence hall, classroom space and dining hall as well as an occasional multipurpose use similar to that of banquets and conferences." Lease Agreement § 3.1, Ex. 11(a) to Pl.'s Mot. for Summ. J. Defendant further covenanted to comply with all laws: "Tenant shall comply with all applicable governmental statutes, ordinances and regulations binding upon the Property, and shall at its expense, procure, maintain, and comply with all permits, licenses, and other authorizations required by any governmental authority for the Tenant's use of the Premises." *Id.* § 3.2. Section 9 gives the scope of landlord and tenant's respective obligations for repair and maintenance. Landlord's obligations are as follows:

> [To] promptly make (i) all repairs, changes, or additions to the Premises required to be made by any federal, state, or local law or regulation or board of fire underwriters, to the Premises (fire system for all floors); and (ii) replace all roof, structural, foundation, and boiler when they require a repair or replacement.

Id. § 9.1. Tenant's obligations are as follows:

> [To] pay for all repairs on the Premises and building systems, including HVAC, plumbing and electrical unless such repair is made necessary by the carelessness, neglect, or intentional act of the Landlord.

Id. § 9.2. The lease does not specifically allocate costs of the water system to either party.

The Water Supply Rule governs use of the Lodge's water system. Under the Rule, a Non-Transient Non-Community Water System ("NTNC") is defined as a system "that regularly serves at least 25 of the same persons daily for more than six months per year." Rules of the Department of Environmental Conservation, Rule 2.2, Code of Vt. Rules 16-3-500:2.2 (WL). A Transient Non-Community Water System ("TNC") is defined as a system "that is not a Non-transient Non-community system." *Id.*

From the period of August 2003 to August 2008, the Lodge's water system was classified and permitted as a TNC system. Plaintiff renewed its TNC permit November 2010, and this permit was in effect when this dispute arose. On August 20, 2015, during a routine sanitary survey, David Gouchberg, Plaintiff's trustee and designated owner for purposes of the water permit, represented to Department of Environmental Conservation ("DEC") employees that the

Lodge's water system purportedly served 45 students for the duration of the academic year. Because the number of students residing at the Lodge exceeded 25, DEC required the Lodge's water system to be reclassified as an NTNC system. The parties then reached out to Otter Creek Engineering for a proposal of the work necessary to bring the system into compliance, the costs of which are the subject of this dispute.

While the parties do not dispute the validity of DEC's 2015 determination, they do dispute whether (1) Defendant increased the number of persons residing at the Lodge and (2) extended its program to become year-round, and (3) whether Plaintiff had knowledge of this increase. Defendant argues that except for the 2008–2009 and 2010–2011 academic years, it has maintained over 25 residential students in its year-round program. Aff. of Thomas J. Maughs-Pugh ¶¶ 7–10. Additionally, Defendant argues that Plaintiff knew of Defendant's plans to house more than 25 students in the Lodge as early as June 2006 in a letter from its former president to Mr. Gouchberg expressing its desire to fill the Lodge to capacity.[1] Plaintiff contends that it was in compliance with all permits when negotiating the 2014 Lease, and that it gave no permission to increase the number of students or extend the duration of the program. Aff. of David Gouchberg ¶¶ 6–7, Ex. 2a to Pl.'s Mot. for Summ. J. Plaintiff further disputes Defendant's interpretation of the enrollment records provided in the Maughs-Pugh Affidavit. Rather than looking at enrollment by the academic year (Fall and Winter of one year and Spring of the next year), the correct interpretation for purposes of the Water Supply Rule should be that of a calendar year (Winter, Spring, and Fall trimesters of the same year). If Plaintiff's characterization is correct, then the number of students at the Lodge did not exceed 25 for all three trimesters until 2012.

[1] In its Statement of Disputed Material Facts, Defendant claims this letter is attached as Exhibit 20. Def.'s Statement of Material Facts ¶ 6. The letter actually attached as Exhibit 20 is a different letter dated November 16, 2005. Ex. 20 to Def.'s Statement of Material Facts.

Discussion

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108 ¶ 14, 200 Vt. 125 (quoting V.R.C.P. 56(a)). In determining whether a genuine issue as to any material fact exists, the court accepts as true allegations made in opposition to the motion for summary judgment, if supported by affidavits or other evidentiary material. *Id.* In addition, "the nonmoving party receives the benefit of all reasonable doubts and inferences." *Id.* "Where a genuine issue of material fact exists, summary judgment may not serve as a substitute for a determination on the merits." *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 10, 179 Vt. 545.

In their submissions to the Court, the parties present the dispute as one of contract interpretation. Generally, contract interpretation is a question of law, and summary judgment is appropriate when a contract is unambiguous on its face. *Cate v. City of Burlington*, 2013 VT 64, ¶ 15, 194 Vt. 265. "If . . . no ambiguity is found [in the terms of the contract], then the language must be given effect in accordance with its plain, ordinary and popular sense." *Ibrandtsen v. N. Branch Corp.*, 150 Vt. 575, 579 (1988). If the contract's meaning is ambiguous, however, it "becomes a mixed question of law and fact and summary judgment may not be appropriate." *Id.* Regardless, "the master rule is that the intent of the parties governs." *Hall v. State*, 2012 VT 43, ¶ 21, 192 Vt. 63 (quoting *Main St. Landing, LLC v. Lake St. Ass'n*, 2006 VT 13, ¶ 7, 179 Vt. 583 (mem.)).

The parties disagree on what provision of the 2014 Lease should govern this dispute, and each cites different principles of contract interpretation to support its case. Plaintiff claims that Section 9.1(ii) is clear in only allocating the cost of the fire system, roof, structure, foundation, and boiler to Plaintiff. Accordingly, because the water system was excluded and because Defendant agreed to comply with all laws in Section 3.2, Defendant bears those costs. Defendant

responds that instead of being exclusive, the bargained-for list of repairs in Section 9.1(ii) is in addition to Plaintiff's general obligation to make repairs required by law in Section 9.1(i). The 2014 Lease, however, makes no mention of the water system.

The interpretations offered by both parties essentially seek to add a term by inference into the contract. As explained by the Vermont Supreme Court,

> [t]o be sure, we consider an agreement as a whole when examining its individual provisions, "but do not read terms into the contract unless they arise by necessary implication." Further, we may not insert terms into an agreement by implication unless the implication arises from the language employed or is indispensable to effectuate the intention of the parties.

Downtown Barre Dev. v. C & S Wholesale Grocers, Inc. 2004 VT 47, ¶ 9, 177 Vt. 70 (citations omitted) (quoting *Morrisseau v. Fayette*, 164 Vt. 358, 366–67 (1995)). Neither inference is compelled by necessary implication of the contract terms, nor from the language employed, nor is either term "indispensable to effectuate the intention of the parties," which was simply to lease the property. Thus, the issue then is not one of contract interpretation, but rather who the burden of substantial repairs falls on when the lease is silent.

Vermont common law has not expressly allocated the cost of substantial repairs in a commercial lease to either landlord or tenant; however, the question of whether the costs of complying with statutes or orders has been properly delegated under a lease has arisen in numerous other jurisdictions. *See generally* Annotation, *Who, As Between Landlord and Tenant, Must Make or Bear Expense of, Alterations, Improvements, or Repairs Ordered by Public Authorities*, 22 A.L.R.3d 521 (1968) (surveying similar cases). These cases stand for the general principle that neither a covenant to repair nor to comply with laws automatically delegates the duty to make "permanent, substantial, or unforeseen building additions or alterations" to the tenant. *Fresh Cut, Inc. v. Fazil*, 650 N.E.2d 1126, 1131 (Ind. 1995). For example, in *Mayfair*

Merchandise Co. v. Wayne, the Second Circuit held a landlord liable for failure to comply with various orders from the New York City Fire and Buildings departments to install a sprinkler system, and enclose a stairway, among other things. 415 F.2d 23, 24 (2d Cir. 1969). In that case, the lease contained two provisions similar to Sections 3.2 and 9.2 in the 2014 Lease. The covenant to comply with laws obligated the tenant to "promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City government . . . for the correction, prevention, and abatement of nuisances . . . [in connection] with said premises during said term." *Id.* at 24–25. The covenant to repair obligated the tenant to "take good care of the premises and . . . make all necessary repairs, structural or otherwise, interior or exterior. *Id.* at 24. In spite of those provisions, the Second Circuit held that the covenant to repair "has been almost uniformly construed as not to include permanent, substantial or unforeseen building additions or alterations." *Id.* at 25. Absent clear evidence that the parties intended otherwise, courts have limited covenants to repair to include only ordinary repairs. *Id.* Furthermore, the covenant to comply with laws has consistently been interpreted as a standard clause to protect the owner from the expense of correcting and abating any nuisances that the tenant may create. *Id.*

Here, Plaintiff argues that the parties only discussed fire system, structure, roof, foundation, and boiler in negotiating the 2014 Lease, indicating that Plaintiff is only obligated as to those elements and no more. Def.'s Mot. for Summ. J. ¶¶ 11, 13. However, this is not clear evidence that the parties intended to place the burden of the water system on Defendant. Nor is this evidence that the parties even discussed who would bear the cost of matters relating to the water system. *Id.* ("[B]ut no mention or negotiations were made regarding the water system."). The absence of clear intent otherwise maintains the presumption that Plaintiff retained the duty to pay for the water system in spite of Defendant covenanting to repair and comply with laws.

Yet, this is not the end of the inquiry. The presumption that the burden to make substantial alterations remains on the landlord will not apply if (1) the parties' intended for the tenant assume the obligation or (2) if such alterations are necessitated by tenant's use. *Fresh Cut, Inc.*, 650 N.E.2d at 1131–32. For example, in *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, the New York Court of Appeals held that the tenant was obligated to pay for the installation of a sprinkler system in the cellar. 237 N.E.2d 868, 870 (N.Y. 1968). The lease contained a covenant to repair obligating landlord to make repairs or alterations, but also contained language obligating the tenant to comply with laws "relating to matters affecting the leased premises . . . involving the use of the leased premises over which [tenant] would exercise control." *Id.* at 869–70. Because the factors cited by the fire department stemmed primarily from the tenant's installation of a conveyor belt system and use of the cellar to store stock, the court held that the cost of installation fell on the tenant. *Id.* As a result, the resolution of each case often turns on the particular lease language and "the facts and circumstances surrounding its making." *Fresh Cut, Inc.*, 650 N.E.2d at 1131–32.

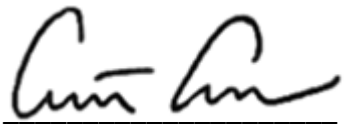
Ultimately, the determination in this case is factual, and depends on the specific facts and circumstances surrounding the making of the lease. Here, we are missing a crucial fact that could rebut the presumption that Plaintiff bears the costs—how the number of people residing at the Lodge came to exceed 25. Plaintiff contends that Defendant increased its enrollment numbers to exceed the permit, while Defendant maintains that its enrollment numbers have always exceeded 25. This fact is material because it determines whether Plaintiff, as landlord, must bear the burden of a substantial change, or whether Defendant, as tenant, must bear the burden of its specific use. Because the parties have not clearly and specifically indicated an intent for Defendant to shoulder the burden of a substantial change—such as the installation of a new water system—the law presumes that this burden falls to Plaintiff. However, depending upon the extent to which the parties were aware of the number of students housed at the Lodge and when,

this presumption might be defeated if unintended changes in Defendant's use necessitated the installation of a new water system. Because there exists a genuine dispute as to a material fact, summary judgment is not proper.

Order

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is DENIED. Defendant's motion for summary judgment is DENIED.

Electronically signed on October 01, 2018 at 02:01 PM pursuant to V.R.E.F. 7(d).



Cortland Corsones
Superior Court Judge