

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

DOWNTOWN BARRE DEVELOPMENT )  
 ) WASHINGTON SUPERIOR COURT  
 ) Docket No. 225-4-05 Wncv  
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 )  
 v. )  
 )  
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 )  
 GU MARKETS OF BARRE, LLC )

Decision

GUMB's Motion for Summary Judgment, filed July 11, 2005

Defendant GU Markets of Barre, LLC (GUMB) seeks judgment based on res judicata on the ground that the claims asserted in Plaintiff's Second Amended Complaint in this case were decided in the first case between the parties, Docket # 669-10-02 Wncv, or alternatively based on collateral estoppel as to issues previously decided in the first case. DBD responds that the conduct underlying the claims in this case occurred after the Supreme Court decision in the first case in May of 2004, and furthermore that it relates to different spaces of DBD's premises, including common areas, other stores, and areas under the exclusive control of DBD.

In the first case, the primary issue was whether the lease terms allowed GUMB and its assignee to divide a single large store space into two separate units, and to cut, remove, or replace structural systems in order to do so. The Supreme Court ruled that the lease terms permitted such conduct, and that the lease "allows the tenant to make alterations, additions, and improvements that better adapt the premises for the purpose of its chosen business, so long as those alterations do not adversely affect the value or decrease the critical contents of the building." *Downtown Barre Development v. C & S Wholesale Grocers, Inc et al*, 2004 VT 47 at ¶13. The Court determined that the provision that makes DBD responsible for repairs of structural systems was "irrelevant." It is not clear whether this provision was irrelevant only in relation to alterations related to dividing the store space under lease, which was the focus of the Court's opinion, or to alterations of any kind for other purposes.

This case demonstrates that the issue of the parties' respective rights to control structural aspects of the overall plaza property on which the leased store is located, including the parking lot, common areas, minor stores, and owner's exclusive space, was not resolved by the first case. Defendant argues that Plaintiff's claims were adjudicated in the first case, but not only did the opinion not address issues external to the building envelope of the lease, it made clear that

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SUPERIOR COURT  
WASHINGTON COUNTY

tenant's alterations may not diminish the value or space of the building. Plaintiff now alleges that Defendant has cut a hole in the building and removed portions of the roof. DBD has legitimate grounds for seeking a determination of whether these actions have adversely affected the value of the building.


Plaintiff also alleges that Defendant has made changes in the parking lot, including changes to a light tower. Such changes could affect interests of DBD as owner as well as interests of other tenants in their leased premises, and may go beyond tenant's right to make alterations to its leased premises. Plaintiff similarly alleges conduct of tenant in changing electrical and phone systems in common areas, minor stores, and spaces within DBD's exclusive control. Such conduct could exceed tenant's rights to make alterations as declared in the first case, and could adversely affect value.

Consequently, the entire suit is not barred by res judicata or claim preclusion. It could be that as the case develops, Plaintiff may be estopped from relitigating certain limited issues as a matter of collateral estoppel or issue preclusion, but GUMB's motion does not differentiate and isolate such issues from others, so a ruling on any particular issue would be premature.

As DBD notes, there are at least 16 years of the lease term remaining, and the decision of the Court in the first case did not attempt to interpret the lease terms in a sufficiently comprehensive manner to provide guidelines for the parties regarding responsibilities and control for structural systems, particularly beyond the bounds of the building envelope. Also, Plaintiff retains its right not to have value diminished by tenant's alterations of the premises, and is entitled to discovery on its declaratory action on this issue.

For the foregoing reasons, the Motion for Summary Judgment is *denied*.

Date at Montpelier, Vermont this 1<sup>st</sup> day of March 2007.

  
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Mary Mills Teachout  
Superior Court Judge