VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-02230

Andante, LLC v. At Choice, LLC

ENTRY REGARDING MOTION

Title:	Motion for Summary Judgment; Cross Motion for Summary Judgment ; (Motion: 7; 8)
Filer:	Harold B. Stevens, III; Pietro J. Lynn
Filed Date:	October 24, 2023; November 15, 2023

The motion is GRANTED IN PART and DENIED IN PART.

Decision on Cross-Motions for Summary Judgment

Before the court are Plaintiff Andante, LLC's, ("Andante") and Defendant At Choice, LLC's ("At Choice") cross motions for summary judgment. Plaintiff seeks summary judgment on its claims that Defendant materially breached the commercial lease in question and that Plaintiff did not. Plaintiff also seeks summary judgment on Defendant's abuse of process claims. Defendant seeks summary judgment that Plaintiff materially breached the lease, and that Defendant is excused by this breach from liability from any subsequent actions that Defendant took, which would otherwise constitute a breach of the lease. Defendant also seeks summary judgment on its abuse of process claims.

Factual and Procedural Background

Plaintiff Andante is a limited liability company that owns and maintains commercial real estate in Vermont and leases units within these properties to various tenants. Andante purchased the Gale Farm Shopping Center on the Mountain Road in Stowe, Vermont in 2016. At that time, it became the successor landlord to several existing commercial tenants who occupied units within the shopping mall. These rental relationships were and remain governed by written, commercial leases that covered the terms of use for the tenant's space as well as the common

areas to which each tenant had non-exclusive rights and access to utilize. As the successor lessor, Andante became a party to each of these existing leases.

Defendant At Choice is also a limited liability company that owned and operated the Stowe Sandwich Shop. In August of 2018, At Choice took over one of the leases for a unit within the Gale Farm Shopping Center. As part of this assignment and assumption, At Choice agreed to be bound to the terms of the existing written lease agreement (the "Lease"). Both Andante and At Choice agree that the Lease governs At Choice's occupancy of the premises and each party's rights and responsibilities within this commercial relationship.

Under the terms of the lease, At Choice's term ran from August 2018 to July of 2023, with the right to renew for a second five-year period, running to July of 2028. [1] Under the terms of the Lease, At Choice's annual rent was comprised of $11,700 in base rent and $4,500 in annual pro rata common area maintenance expenses ("CAM expenses"). Monthly lease payments were calculated by adding these two costs and then dividing it into monthly shares. The Lease calculated that these two costs averaged to $1,350 in total rent due per month.

The CAM expenses, however, had two additional layers to calculating its payment. Under Section Nine of the Lease, the Landlord had responsibility for setting the yearly CAM expenses at the beginning of each calendar year. In 201618, those were set at $4,500. These beginning-of-the-year rates, however, were only an estimate based on the expenses of prior years and the Landlord's experience with the costs and schedule of costs to maintain the property. At the end of each calendar year, Landlord was obligated and entitled to effectively true-up the actual costs to maintaining the common areas. As Section Nine states, in part:

> As soon as practicable following the close of each calendar year, Landlord shall submit to Tenant a statement indicating the actual amount of expenses advanced and/or incurred by Landlord in performing its obligations hereunder for the immediately preceding calendar year, the actual amount of Tenant's proportionate share thereof, the amount off the Landlord's estimate thereof for such immediately preceding calendar year, and the amount of the resulting balance due thereon, or overpayment thereof, as the case may be. Appropriate adjustment shall thereupon be made between the parties, on demand, on the basis of such statement. Each statement shall be binding upon Tenant, its successors and

[1] The original lease term ran from August 2016 to July 2018 with two five-year options to renew up to July 2028. By the time At Choice assumed its lease, the first term had expired, and the five-year term had begun.

> assigns, as to the matters set forth therein, if no objection is raised with respect thereto withing ninety (90) days after submission of each statement to Tenant.

Exhibit 1 (Lease Agreement) at 8.

There are several important provisions and omissions in this section. First, this section of the Lease make clear that while Andante has an obligation to make estimates, the responsibility for paying the actual expenses lie with At Choice to pay on a pro rata basis in accord with its square footage of rental space. Second, there is no "time is of the essence provision" or other language that would require Andante to present the actual costs within a set time frame. Third, there is language indicating that the time for presenting such billing was not limitless and was to be made "as soon as practicable following the close of each calendar year . . . ." Fourth, the time for objecting to CAM expenses is limited to a 90-day window following the receipt of notice, but the window for negotiating and adjusting the CAM expenses is not tied to this deadline and allows for negotiating and dealing with such charges to extend beyond the 90-day window. Fifth, there is no monetary limit or cap to the CAM expenses. Tenant is ultimately obligated to pay whatever the actual cost of maintenance is.

In early 2021, Andante reached the conclusion that it had underbilled At Choice for the CAM expenses for the years 2018–2021. Andante informed At Choice in June of 2021 that it sought $38,305 in retrospective CAM expenses that had been mistakenly excluded from prior CAM expense billing. Andante sent supporting documentation showing how it had re-calculated the prior CAM expenses and had developed the new amount.

At Choice did not review the CAM expenses or Andante's explanatory paperwork with Andante or negotiate with Andante. At Choice simply disputed the propriety and process of such late billing. At Choice's objection was founded on the premise that billing for prior years went beyond the scope of Section Nine's language and that such billing was not permitted or even covered by the express terms of the Lease. At Choice further contended and continues to contend that there was no agreement sought or obtained between the parties about the validity of these claimed amounts. Following this objection Andante did not withdraw the proposed retrospective adjustments to the CAM expenses. At Choice then terminated the lease and vacated the property.

Andante subsequently filed the present action to recover its damages from the alleged breach of lease as well as for subsequent damages that it claims At Choice is responsible for under the lease. At Choice filed a counterclaim for declaratory judgment citing Plaintiff's breach relating to the retrospective CAM expenses and contends that it is excused from any further obligations or performance under the lease as a result of this breach.

Legal Analysis

I. Summary Judgment Standard

Before the Court are the parties' cross-motions for summary judgment. "The court shall grant summary judgment 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." V.R.C.P. 56(a). The court may enter summary judgment when, "after adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [his or] her case and upon which [he or] she has the burden of proof." *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 13, 178 Vt. 244 (quotation marks omitted).

When determining whether there is a disputed issue of material fact, a court must afford the party opposing summary judgment the benefit of all reasonable doubts and inferences. *Carr v. Peerless Insurance Co*., 168 Vt. 465, 476 (1998). However, a non-moving party cannot rely on bare allegations, unsupported generalities, or speculation to defeat a properly supported motion for summary judgment. *See* V.R.C.P. 56(c), (e); *Webb v. Leclair*, 2007 VT 65, ¶ 14 (mem.). "[C]onclusory allegations without facts to support them are insufficient to survive summary judgment." *Robertson v. Mylan Laboratories, Inc*., 2004 VT 15, ¶ 48. Thus, an opposing party's allegations must be supported by affidavits or other documentary materials that show specific facts, which are sufficient to justify submitting his or her claims to a factfinder. *See Robertson*, 2004 VT 15, ¶ 15; *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

II. Defendant's Statements of Facts

Defendant At Choice's statement of disputed facts does not strictly comply with the requirements of Rule 56. At Choice does not include the necessary "specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute" as required by Rule 56. V.R.C.P. 56(c)(2). Nor do paragraphs 1, 7, and 8 "reproduce each numbered paragraph of the moving party's statement before including the response thereto" as

required by the same rule. Id. At Choice's counter statement of undisputed facts also lacks these specific citations to the record in several places. Only paragraphs 13–16 contain "specific citations to particular parts of materials in the record" as required by Rule 56. V.R.C.P. 56(c)(1) and (2).

It is generally not the role of the court to search the record of a case for material which supports assertions which a party has declined to support. *Travelers Insurance Co. v. Demarle, Inc., USA*, 2005 VT 53, ¶¶ 6–8. When a party does not properly support an assertion of fact, the Court may, under V.R.C.P. 56(e) either give the party an opportunity to properly support the fact; consider the fact undisputed for the purposes of the motion; grant summary judgment based on the motion and supporting materials; or issue any other appropriate order. V.R.C.P. 56(e).

In this case, statements 1 through 12 of At Choice's counter statement of undisputed material facts appear to be undisputed accounts of the identity of the parties (SUMF 1, 2); a history of how the lease was formed (SUMF 3); a history of Andante's and At Choice's assumption of their respective positions as landlord and tenant (SUMF 4–6); obligations and rights under the lease (SUMF 7, 10); and the specific history of At Choice's actions and payments under the lease (SUMF 8, 9, 11, 12). As these facts appear to be generally agreed upon as undisputed, the Court will treat them as such for purposes of the present motion. As to At Choice's statements 13–16, these statements are supported by specific references to the record and will be treated as such. As to At Choice's statements 17 through 25, these are mixed statements recounting undisputed actions (service of a trustee summons, freezing of a bank account—SUMF 17, 19, 20, 21, and 25); legal conclusions (SUMF 18 and 23), and unsupported allegations of harm (SUMF 22–24). The Court will treat them accordingly in its analysis.

As to At Choice's objections to Andante's Undisputed Statement of Material Facts, the objections do not cite to any specific portions of the record. The Court understands these objections to go less to the underlying facts than to the inferences and conclusions attached to the statements. For example, At Choice objects to Andante's recitation at ¶ 14 that At Choice's owners transferred assets from At Choice to another LLC for the purpose of frustrating or avoiding any claims by Andante. At Choice does not appear to dispute that the transfer occurred and does not cite to evidence that it did not. Instead, At Choice's objections appear to focus on Andante's characterization of the reason for the move. As such, the Court understands At

Choices' disputes to go to the reasonable inferences to be drawn from the various facts marshalled by Andante in support of its motion. As such, the Court will construe such inferences against the moving party. *Morisseau v. Hannaford Bros.*, 2016 VT 17, ¶ 12.

III. Materiality of Breach by Andante

At the heart of this dispute there are two questions. Did Andante's 2021 demand for retrospective CAM expenses from 2018 to 2020 constitute a material breach of the parties' lease? If so, was At Choice entitled to terminate its lease because of Andante's actions?

A lease, as a contract, "must be interpreted according to the parties' intent as expressed in the writing." *Sutton v. Purzycki*, 2022 VT 56, ¶ 37 (quoting *Lussier v. Lussier*, 174 Vt. 454, 455 (2002) (mem.)). If the plain language of the contract is clear, then the Court must use this language to govern the Court's interpretation of the agreement without recourse to parol evidence. Id. In this case, there is no dispute as to what document governs the parties' commercial relationship, and there is no evidence that either party contends that the provisions of the Lease are ambiguous.

Given these terms, then the issue for the Court is to take the language of the Lease, as it governs the parties' rights and responsibilities both in general and specific to the assessment, invoicing, and collection of CAM expenses, and apply it to the undisputed actions of the parties.

In this case, At Choice contends that Andante's demand for additional, retrospective payment constituted a material breach of the lease. For the purposes of Andante's motion, the Court infers that a demand for $38,305 is, in fact, a large and disproportionate amount, particularly in terms of the prior estimated CAM expenses and in relatively size to the underlying rent.[2] But whether the demand itself constituted a breach is less clear. As noted above, there are several complicating factors. First, there was no provision that CAM expenses be made by a particular date. The only limitation that the Lease imposes is that the actual expenses be presented "As soon as practicable following the close of each calendar year . . . ." (Pltf Ex. 1 at 8.) Second, there is no cap or limitation of At Choice's liability for its pro rata share of the actual CAM expenses or a limitation on when and how Andante can present such corrective demands. Third, it is undisputed that under the terms of the Lease, At Choice would be liable for

[2] At Choice notes that the delay in notice of these larger costs effectively took away its ability to adjust its pricing to reflect these additional costs.

its actual share of CAM charges and that any amount paid in advance only represented an estimate, which Andante had the sole responsibility of creating.

As the Vermont Supreme Court has noted, it is "axiomatic that parties can define their contractual relationship by the provisions employed in their contract. Contracting parties can define what will constitute a material breach of their contract." *McGee Const. Co. v. Neshobe Development, Inc.*, 156 Vt. 550, 554 (1991). Parties can do this in a number of ways. They can expressly label a particular obligation to be material. They can also include language such as "time is of the essence," which signals that any delay in performance can void the agreement. *Carter v. Sherburne Corp.*, 132 Vt. 88, 92 (1974). Without such language or similar terms, the Court will not presume that late performance, in and of itself, constitutes a material breach. "A court of equity will generally relieve a party who has not performed his contract strictly as to time, unless it appears affirmatively that the parties regarded it as an essential element in their agreement . . . ." *Champlain Oil Co. v. Trombley*, 144 Vt. 291, 297 (1984).

It is a similarly well-established maxim that only a material breach of a lease gives rise to the right of termination or cancellation. *Mongeon Bay Props., LLC v. Malletts Bay Homeowner's Ass'n*, 2016 VT 64, ¶ 51; see also *R.F. Chase*, *Commercial Leases: Application of Rule That Lease May Be Cancelled Only for "Material Breach"*, 54 A.L.R.4th 595 § 1 (1987).

Looking at the plain language of Section Nine, this provision does not establish a specific timeline for Andante to present CAM expenses. That said, the longer the delay and the greater the disparity between estimated and "actual" charges, the more reason there would be for At Choice or any other tenant to suspect and dispute the charges, and potentially the more well-founded such objections would become.[3] At the same time, the provisions of Section Nine anticipate the possibility of dispute over CAM expenses. Section Nine provides a specific course of action. Within 90 days of receiving a demand for a CAM expense, a tenant has the right to object to such charges—without restriction—and then the parties have an unfixed amount of time to negotiate or potentially litigate such charges before they become final and due.

[3] There are multiple examples outside Vermont where courts have allowed tenants to challenge such fees as excessive or outside the definition of common area maintenance. See, e.g., *Tin Tin Corp. v. Pacific Rim Park, LLC*, 170 Cal.App.4th 1220, 1224–25 (Cal. App. 2009); *Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So.2d 220, 221–22 (Fla. App. 2005); *GELC, LLC v. Frontier Cambridge, LLC*, 2018 IL App. (2d) 180012-U, at ¶¶ 30–32 (Ill. App. 2018).

The conclusion that the Court reasonably draws from this language is that while the Lease does not expressly allow for Andante to submit retrospective CAM charges from prior years, it does not prevent such—particularly where such charges have actually and rightfully been incurred in maintaining the common areas for which all parties benefit. What the Lease does provide is for any dispute arising from a CAM expense to be managed by the parties without constituting a material breach of the lease or a breakdown in the lease relationship.

Courts that have been confronted with similar provisions have interpreted the assessment of these CAM expenses and the disputes arising from either the assessment or the retroactive assessment of such charges to be non-material. The North Dakota Supreme Court, in one instance, ruled in favor of a tenant and concluded that a dispute over CAM expenses did not constitute a material breach of the lease as such CAM expenses did not allow the landlord to summarily evict a tenant for non-payment. *VND, LLC v. Leevers Foods, Inc.*, 672 N.W.2d 445, 451 (SD 2003). This view is consistent with and has been cited favorably by the Restatement (Second) of Property § 12.1 (1977, 2024 update).

Particularly instructive to this situation is a case that the Kentucky Court of Appeals decided in 2019. *Louisville Galleria, LLC v. Kentucky Pub investments, LLC*, 2019 WL 1967970 (Ky. App. 2019) (unpub. mem.). In this decision, a commercial landlord had presented its tenant with late CAM expenses, to which the tenant objected. Id. at *2. The dispute was initial litigated but resolved, in part, when the tenant agreed to pay the new CAM expense rates prospectively. Id. The retrospective charges were not resolved and remained unpaid. Id. at *2–3. Landlord later applied the Tenant's new payments to the retrospective amount and began a new eviction proceeding for failure to pay the new amounts. Id. at * 34. In the subsequent litigation, the Court explored whether the imposition of the late CAM expenses were reasonable. As noted in the decision, the first and foremost issue was not the imposition of the expenses but whether the substantially large amount of retrospective costs were supported by the reasonable and actual CAM expenses incurred by Landlord during those times and whether there was fault either in Landlord's initial estimates or the delay in submitting the actual charges to the Tenant. Id. at *5–10.

The Court in *Louisville Galleria, LLC* ultimately found that Landlord's retrospective CAM expenses were supported and reasonable, and thus did not give rise to valid defense to

Landlord's detainer action. Id. at *13, *15, *16. In particular, the Court found that the lack of a cap on CAM expenses subjected the Tenant to "unknown exposure" and absent evidence that there was improper assessment of the charges, improper delay in delivering the charges, or other fraudulent misrepresentation, Tenant remained liable for its pro rata share of the actual CAM expenses, even if those expenses were delayed and resulted in a substantial change in amounts from what was initially estimated. Id. at *13. The Court noted that only if Landlord had tried to evict solely on the untimely reconciliation notices might Tenant then have a claim to a breach of the covenant of good faith and fair dealing because Landlord's delay would have materially contributed to Tenant's ability to make timely payments. Id. at *14. The fact that Landlord did not maintain such an action but sought to resolve it with Tenant and gave Tenant additional time, effectively absolved Landlord of such claims. Id.

The Court finds the reasoning employed in *Louisville Galleria, LLC*, to be persuasive and instructive. In the present case, At Choice agreed to what was an "unknown exposure" to CAM expenses, and Andante had the right to seek such payments to the extent that the expenses conformed to the scope of CAM expenses under the terms of the Lease so long as there was neither unreasonable delay nor bad faith in presenting the retrospective expenses. To the extent that At Choice objected to these charges, its remedy, as laid out by the Lease, was to challenge the CAM expenses and the notice it understood to be improper under the terms of the Lease.

At Choice had the unmitigated right to lodge such an objection, and apart from the timing related to filing such objection within 90 days, the parties had no other specific deadline to resolve or settle the dispute, during which time, the amounts sought would have remained disputed and unavailable as a basis for terminating the tenancy or giving right to claims for detainer.

This reasoning leads to the conclusion that Andante's presentation of the retrospective CAM expenses was not in and of itself a material breach of the lease. This is not to say that the CAM expenses sought were reasonable or even allowable due to their delay, but it is to say that the mere notice and demand was not enough to constitute a material breach of the lease. Therefore, Andante was not in material breach of the lease in June and July of 2021 when it notified At Choice of the retrospective CAM expenses and made a demand for their payment.

The facts leading up to At Choice's vacating of the premises, which are undisputed for the purpose of summary judgment, do not amount to per se bad faith by Andante. Although the increased expenses were not presented in line with an annual billing cycle, Defendant did not dispute any particular expense and to date has not included such objections in its claims. While At Choice objected to the timing, it did not maintain this objection within the lease relationship. It chose to vacate and stop paying on its rent obligations. In this respect, the Court finds the present matter closer to *Lousiville Galleria, LLC*, and distinguishable from *S & S Tracking*, as cited by At Choice, which related to charges for goods which were not actually received. *S & S Tracking v. Whitewood Motors, Inc.*, 346 N.W.2d 297, 300 (S.D. 1984). The Court, therefore, finds that Andante did not materially breach the lease.

IV. Materiality of Breach by At Choice

This brings the Court to the second question of whether At Choice was justified in vacating the premises and excused from the remainder of its lease. At Choice asserts that it was justified to its choice to vacate based on a series of equitable principles, including a landlord's obligation to cooperate with a tenant in good faith. See *Century Partners, LP v. Lesser Goldsmith Enterprises, Ltd.*, 2008 VT 40. Any of these positions might well have informed or given At Choice the right to object to the retrospective CAM expenses within the context of a Section Nine objection, and might have well given At Choice grounds to avoid all or a significant portion of them in legal proceedings based on such objections, but none of these principles or actions gave rise to the right of termination, which as both parties recognize is not favored in law or equity. *Standard Packaging Corp. v. Goodrich*, 131 Vt. 57, 59 (1972). This is particularly, in a case like the present where the alleged breach is not a material one. *Mongeon Bay Props., LLC*, 2016 VT 64, at ¶ 51

Andante claims that At Choice materially breached the lease by terminating the lease and vacating the premises. Because the court has found that Andante did not commit a material breach of the lease which would terminate At Choice's payment obligations, the Court finds that At Choice's nonpayment of the rent and vacating of the premises did constitute a substantial and material breach of the terms of the Lease. *Greene v. Rainbow Properties, Ltd.*, 145 Vt. 576, 580 (1985). This finding does not prevent At Choice from showing that Andante failed to mitigate its damages at trial, which is an issue that lies outside of the Court's current decision on

Summary Judgment as it involves disputed facts as to what constituted reasonable mitigation efforts.

V. Abuse of Process

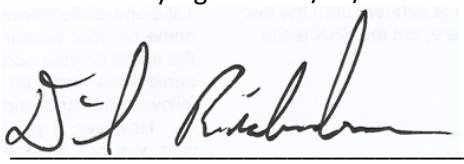
"A party alleging abuse of process must demonstrate 1) an illegal, improper or unauthorized use of a court process; 2) an ulterior motive or an ulterior purpose; and 3) resulting damage to the plaintiff." *Weinstein v. Leonard*, 2015 VT 136, ¶ 22, 200 Vt. 615. Here, Andante admits to improperly sending the Summons to Trustee to At Choice's bank in advance of approval by the Court. There is significant dispute, however, based on the facts as presented as to whether or not Andante acted with an ulterior motive or purpose. There is strong evidence to suggest that the service was improper and that there was either knowledge or constructive knowledge that the trustee process was improper. At this stage, the Court cannot definitively find that Andante did not act with legal malice based on the record before it. The issue is, therefore, reserved for trial, and both motions must be denied as to this claim.

ORDER

Based on the foregoing, Plaintiff Andante's motion for summary judgment **GRANTED IN PART** and **DENIED IN PART**. Andante's request for summary judgment on the issue of whether its delivery and demand for retrospective CAM charges was not a material breach of the Lease is **GRANTED** in accord with V.R.C.P. 56. Andante's request for judgment on At Choice's claim that its cessation of rent payments and vacating of the premises was not a material breach is **GRANTED.** Andante's request to dismiss At Choice's claim for abuse of process is **DENIED.** Defendant At Choice's motion for summary judgment is **DENIED**.

Based on this Order, the Court shall schedule a status conference with the parties to determine what issue remain to be tried and to set dates for such a trial.

Electronically signed on 3/28/2024 4:43 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge