

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

Andante, LLC v. At Choice, LLC

### **FINDINGS, CONCLUSIONS, AND ORDER**

This action involves a commercial lease dispute. Plaintiff Andante, LLC is the former landlord defendant At Choice, LLC, and now seeks damages against defendant for allegedly breaching the parties' lease agreement and for outstanding rent. The case came before the court for a bench trial on September 23, 2016. For the reasons set forth below, the court will enter judgment for plaintiff for \$22,618.16.

#### **Findings of Fact**

In 2016, Thistle Investments II, LLC signed a lease agreement with GR8 Food, LLC to rent commercial space at the Gale Farm Shopping Center in Stowe in order to operate the Stowe Sandwich Company restaurant. Thistle later sold the property to Andante subject to the lease. Thereafter, in 2018, GR8 Food sold the Stowe Sandwich Company and assigned the lease to defendant, which assumed the obligations thereunder. The assignment provided for a lease term of five years beginning August 1, 2018.

The lease obligated plaintiff, as landlord, to maintain common areas for the benefit of plaintiffs' shopping center tenants and their customers, and made defendant, as tenant, responsible for its proportionate share of the associated expenses, which plaintiff refers to as common area maintenance or CAM charges. In relevant part, the lease provides:

In consideration of Landlord's agreement to operate and maintain the Common Areas, Tenant covenants and agrees to pay a proportionate share of the expenses advanced and/or incurred by Landlord therefor in each calendar year during the term of this Lease . . . . [T]he Landlord shall annually estimate the total cost of such expenses for the Shopping Center on the basis of its experience and reasonably anticipated expenses therefor, and the Tenant shall pay to the Landlord, on the first day of each calendar month, together with its monthly installment of minimum rent due hereunder, an amount equal to 1/12 of its proportionate share thereof. 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 of 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 assigns, as to the matters set forth therein, if no objection is raised with respect thereto within ninety (90) days after submission of each statement to Tenant. Tenant shall have the right to examine Landlord's books and records at the offices of Landlord during ordinary business hours for the purpose of verifying the matters set forth in the statement for the immediately preceding calendar year.

Pls. Exh. 3 (Lease Agreement) at § 9.

Under the lease, defendant's rent was set at \$11,700 annually (\$975 per month), along with an annual estimated CAM charge of \$4,500 (\$375 per month). Plaintiff did not assess defendant any additional CAM charges before 2021. This was simply an oversight. That year, plaintiff assigned its outside accountant Colleen Shephard to review the books for the shopping center and prepare an accounting of outstanding CAM charges owed by defendant.

On or about June 17, 2021, Colleen prepared a statement accounting for all CAM charges for the shopping center from September 2018, when defendant took over the lease, through May 2021. That statement reflected \$340,489 in total expenses for insurance, property management fees, repairs and maintenance, property taxes, and utilities. Based on its square footage leased, defendant was assigned responsibility for 11.25% of that amount, or \$38,305. Plaintiff refers to this as the "past due amount." As noted below, this demand mistakenly failed to credit defendant for \$12,000 in estimated CAM charges that it had already paid during the tenancy.

On June 30, 2021, plaintiff—through counsel—demanded payment in full of the past due amount by July 15, 2021. Defendant retained counsel and requested documents to support the CAM charges, which plaintiff provided. On July 20, defendant accused plaintiff of breaching the lease by failing to give plaintiff timely notice of the CAM charges. Defendant stated that, because of the breach, it would vacate the premises on July 31. Defendant did not otherwise object to plaintiff's assessment.

Defendant paid rent for July 2021 but stopped paying thereafter. Plaintiff attempted to relet the space after defendant vacated but was not able to find a new tenant until July 2022.

Plaintiff filed this action in August 2021 alleging that defendant breached the lease by failing to pay the CAM charges and vacating the property before the end of the lease term. Defendant counterclaimed for breach of the lease and abuse of process.

In an order resolving the parties' summary judgment motions, the court concluded that plaintiff's retroactive CAM charge billing did not constitute a material breach of the lease, and that accordingly, defendant materially breached the lease by vacating the property before the lease term expired. Entry Regarding Motion (March 29, 2024). The court later declined defendant's request to reconsider that order. Entry Regarding Motion (Apr. 23, 2024).

Plaintiff acknowledged at trial that plaintiff should be credited for \$12,000 in CAM charges previously paid. Accordingly, plaintiff seeks a damages award of \$26,305 in past due CAM charges along with eleven months of rent totaling \$14,850, for a total of \$41,155.

Defendant, which was represented by its non-attorney owner Rosalind Moffit at the bench trial, argues the CAM charges plaintiff assessed are unreasonable. Defendant generally argues that the CAM assessment was a pretext for plaintiff to evict defendant from the premises following an earlier dispute concerning renewal of defendant's lease.<sup>1</sup>

### **Conclusions of Law**

Plaintiff seeks the past due CAM charges from September 2018 through May 2021, and rent owed from August 2021 through June 2022.

As the court previously noted at the summary judgment stage, the lease does not expressly prohibit plaintiff from retroactively billing for CAM charges incurred in prior years. But it does provide that plaintiff must provide an accounting of the CAM expenses actually incurred "[a]s soon as practicable following the close of each calendar year." In various contexts, courts have interpreted the term "as soon as practicable" to mean, essentially, without unreasonable delay. *See, e.g., Amalgamated Lithographers of Am. v. Unz & Co. Inc.*, 670 F. Supp. 2d 214, 229 (S.D.N.Y. 2009) (interpreting term in ERISA statute to permit the defense of laches if there was unreasonable delay); *U.S. Fid. & Guar. Co. v. Gable*, 125 Vt. 519, 525 (1966) (Shangraw, J., concurring) (the "contractual right to have a written notice . . . as soon as practicable . . . means within a reasonable time under all the circumstances").

Under the circumstances here, the court concludes that a delay of one year to present CAM expenses following the close of calendar is unreasonable and is thus not permitted under the terms of the lease. "The cardinal rule in construing contracts is the intent of the parties." *Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 27, 218 Vt. 144 (quotation omitted). The lease's treatment of CAM charges—with detailed provisions for estimating

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<sup>1</sup> Defendant's counterclaims for breach of contract and abuse of process were dismissed by the court based on defendant's failure to prosecute. *See* Entry Order (Sept. 2, 2025).

the charges in advance of each year, accounting for the actual expenses incurred annually promptly following the close of each calendar year, and providing a framework for resolving disputes—was clearly intended to provide a mechanism to annually resolve financial liabilities and provide the contracting parties with a degree of stability and consistency from year-to-year over the course of what was expected to be a multi-year commercial lease. Moreover, plaintiff offers no explanation for the delay other than it neglected to bill defendant for its actual CAM expenses before 2021. The court accordingly concludes that the “as soon as practicable” provision in the lease precludes plaintiff from attempting to recover any CAM expenses incurred before calendar year 2020. Defendant has not challenged plaintiff’s accounting with any specificity and did not take advantage of the dispute resolution process set forth in the lease. Accordingly, the court concludes defendant is liable for \$7,768.16 in past due CAM charges, representing defendant’s proportionate share of the expenses incurred for calendar year 2020 and the first five months of 2021 as set forth in plaintiff’s accounting.<sup>2</sup>

The court further concludes that defendant is liable for the outstanding rent, including the estimated CAM charges, as set forth in the lease from August 2021 until defendant relet the premises in July 2022. Notwithstanding some communications between the parties in 2020 regarding potentially negotiating a new lease or lease extension, the plain language of the 2018 lease assignment provides the term of defendant’s lease was from August 1, 2018, until July 31, 2023. The court previously determined at the summary judgment stage that plaintiff breached the lease by vacating before that term expired. Plaintiff is accordingly liable for rent and CAM charges while the property remained vacant. *See* Lease 1 (tenant liable for rent for term of lease), 8 § 9 (tenant liable for CAM charges for term of lease). Although defendant argued at trial that plaintiff failed to mitigate its damages, plaintiff’s principal credibly testified that he was actively trying to rent the premises after defendant vacated. Accordingly, defendant is liable for eleven months of rent and estimated CAM charges as set forth in the lease, for a total of \$14,850.

### **Order**

The court will enter judgment for defendant in the amount of \$22,618.16.

Electronically signed on: 12/30/2025 pursuant to V.R.E.F. 9(d)



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Benjamin D. Battles  
Superior Court Judge

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<sup>2</sup> \$123,893 (2020 expenses) + \$51,824 (2021 expenses) = \$175,717 x 11.25% (defendant’s proportionate share) = \$19,768.16 - \$12,000 (CAM charges previously paid) = \$7,768.16.