NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 17, 2020

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RE: *Teachers Insurance and Annuity Association of America v. Prendergast Group, Inc., et al.*
Case No. CL-2019-876

Dear Counsel:

As the Prendergast Group, Inc. ("PGI" or "Tenant") began to experience financial difficulties as an East Coast Sub Shop, a dispute arose with its landlord, Teachers Insurance and Annuity Association of America ("TIAA" or "Landlord"). Further compounding the situation was the allegation that the guarantors to the Lease, Rebecca Prendergast and Joseph T. Prendergast ("Mr. and Mrs. Prendergast" or "the Guarantors") failed to satisfy their obligations. The tension culminated in a lawsuit brought by TIAA against PGI and Mr. and Mrs. Prendergast

OPINION LETTER

and a counterclaim brought by PGI against TIAA. A bench trial was conducted over three days in February.

At the conclusion of trial, the Parties requested to submit additional closing arguments in briefs. Roughly thirty days after trial the Parties submitted supplemental post-trial briefs. The Court had the opportunity to review the pleadings (including the trial briefs and post-trial briefs), the evidence presented, and the arguments of counsel. For the reasons described below, the Court finds for the Plaintiff and awards it $514,919.23 in damages against PGI and $403,705.32 in damages against Mr. Prendergast. The Court further finds for the Plaintiff on the Defendant PGI's Counterclaim.

Factual and Procedural History

PGI set out to operate a "Penn Station East Coast Subs" franchise in the Reston area of Fairfax County. To facilitate this goal, it entered into a Deed of Lease with AG/ARC Plaza America Retail Owner, L.L.C. on August 12, 2013 ("Lease") for approximately 1,620 square feet of space in the Plaza America Shopping Center known as 11652 Plaza America Drive, Reston, Virginia (the "Premises"). Associated with this transaction was a signed Guaranty purportedly entered into by Mr. and Mrs. Prendergast.

TIAA is the successor in interest to the original Landlord under the Lease. Although the Defendants argued at trial that TIAA failed to establish that it was the successor in interest and the correct party to this lawsuit, the evidence suggests otherwise. PGI through its Counterclaim made the same allegation; that TIAA was the successor in interest to the original landlord. *See* Paragraph 12 of PGI's Counterclaim. Furthermore, all three Defendants made similar allegations in their responsive pleadings in this case. *See, e.g.*, Defendants' Demurrer to the Complaint ("The Plaintiff, TEACHERS INSURANCE AND ANNUITY (hereinafter 'TIAA') is the successor Landlord for all purposes under the Lease."). Finally, and perhaps most compelling is the default notice admitted without objection, establishing that TIAA was the successor in interest to the original landlord. *See* Plaintiff's Exhibit No. 11 (defining Landlord as "Teachers Insurance and Annuity Association of America, successor-in-interest to AG/ARC Plaza America Retail Owner, L.C.C."). Testimony also established TIAA's role as the successor in interest. This evidence, combined with the allegations contained in the Counterclaim, is sufficient evidence to establish that TIAA was the successor in interest to the original landlord.

Beginning in December of 2017, PGI began to fall behind on its rent payments. The Lease required PGI to pay "Minimum Rent," and other costs. Pursuant to the Lease, PGI was notified that it was in default. Despite the notice, neither PGI, nor the Guarantors, cured the default. *See, e.g.*, Plaintiff's Exhibit Nos. 6, 11.

As the year progressed, PGI continued to struggle as a business and ultimately ceased operations, closing its store in August of 2018. In fact, PGI reached a settlement agreement with its Franchisor to terminate its franchisee agreement. *See* Plaintiff's Exhibit No. 58. The Court did not find the testimony of Ms. Vermillion, the owner of PGI, that it was forced to close its restaurant as a result of some action taken by the Franchisor, credible. The evidence

overwhelmingly contradicted this position. The Settlement Agreement between PGI and its Franchisor illustrated a negotiated termination which included a mutual release. In other words, PGI voluntarily decided to close its restaurant due to a variety of factors, but not because the Franchisor compelled them to close. PGI's failure to keep its store open constituted another default under the Lease, as articulated by the Default Notice issued by the Landlord in October of 2018. Specifically, PGI was required to "continuously, actively and diligently operate its business at the Premises and use the Premises in a first-class and reputable manner . . . ." Article 6.3 of the Deed of Lease, Plaintiff's Exhibit No. 2. Again, despite notice, PGI nor the Guarantors took any steps to cure the default as outlined by the Landlord.

As a result of the failure to satisfy their rent obligations under the Lease, as well as their obligations to remain open for business, TIAA brought the current action against PGI and the Guarantors. Trial was conducted over three days with both sides presenting several witnesses.

Analysis

TIAA's Claims for Breach of Contract

TIAA has two separate, but related, claims for breach of contract. The first is against the corporate entity PGI for the failure to pay rent and maintain its business. Central to every breach of contract claim are three elements: "(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 267 Va. 612, 619 (2004).

In the present case, the evidence presented clearly established a number of enforceable obligations PGI owed to TIAA as set forth in the Lease. *See generally* Plaintiff's Exhibit Nos. 2-3.

As to breach, TIAA proved by a preponderance of the evidence that PGI breached two contractual obligations. Article 4 of the Lease set forth rent payment requirements—PGI failed to pay rent beginning in December of 2017, thereby breaching its contractual obligation. The Lease furthermore required in Article 6.3 that PGI shall "(a) continuously, actively and diligently operate its business at the Premises and use the Premises in a first-class and reputable manner, (b) keep the Premises fully fixtured, fully stocked with each type of merchandise sold in the conduct of its business and fully staffed with adequately trained personnel; and (c) keep the Premises open for business during the Retail Hours . . . at a minimum." The evidence showed that PGI breached this provision when it closed its store in August of 2018.

In addition, TIAA seeks damages based upon a Guaranty entered into by Mr. and Mrs. Prendergast.

Concerning Mr. Prendergast, TIAA showed by a preponderance of the evidence that Mr. Prendergast signed the Guaranty, guaranteeing an obligation to pay for PGI's default under the Lease. Mr. Prendergast further received notice of PGI's default as required under the Guaranty,

but failed to pay as contractually obligated. As such, TIAA established a contractual obligation and breach against Mr. Prendergast.

Turning to Mrs. Prendergast, TIAA alleged that Mrs. Prendergast owed the same obligations under the Guaranty. Indeed, Mrs. Prendergast's signed name purports to appear on the document as a Guarantor. The evidence and testimony before the Court, however, lead to the conclusion that Mrs. Prendergast herself did not sign the Guaranty.[1] "It is elementary that mutuality of assent—the meeting of the minds of the parties—is an essential element of all contracts." *Phillips v. Mazyck*, 273 Va. 630, 636 (2007). Mutuality of assent gives rise to enforceable legal obligation, and failure of the former precludes the latter. Whether a party assents to a contract is ascertained "from that party's words or acts, not from his or her unexpressed state of mind." *Id.*

In light of the evidence showing that Mrs. Prendergast did not sign the Guaranty, TIAA failed to establish that Mrs. Prendergast assented to the Guaranty through words or action. As such, TIAA's breach of contract claim against Mrs. Prendergast fails because it did not establish that Mrs. Prendergast owed TIAA a legally enforceable contractual obligation.

Having found breach of contract against PGI and Mr. Prendergast under the Lease and Guaranty, respectively, the Court's inquiry turns to the measure of damages.

TIAA's Damages

Against PGI, TIAA seeks both contractual damages based on a failure to pay rent, as well as liquidated damages provided for in the Lease. Article 6.3, discussing PGI's obligation not to "go dark," provides:

> The obligations specified in this Section will enhance the business activity and patronage of all stores in the Center. Tenant's failure to comply with such obligations will cause Landlord damages which might be difficult to measure accurately. Accordingly, if Tenant fails to fulfill any such obligation, then, in addition to any other remedy available to Landlord, Tenant shall pay to Landlord as liquidated damages a sum equal to three times the per diem Minimum Rent for each day of such failure.

The law concerning validity of liquidated damages clauses is well established.

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[1] Mrs. Prendergast testified that she had not seen the Deed of Lease or Guaranty prior to this case. She further testified that she did not sign the Guaranty. Mr. and Mrs. Prendergast's daughter, the purported witness to Mrs. Prendergast's signature on the Guaranty, testified that the witness signature on the Guaranty was not hers either. The Court had the opportunity to review Mrs. Prendergast's purported authentic signature on several documents, including on Plaintiff's Exhibit No. 65, which recertified Mrs. Prendergast's interrogatory answers before a notary. Having considered purportedly authentic examples of Mrs. Prendergast's signatures, there are stark differences apparent to even the untrained eye between those signatures and the one appearing on the Guaranty at issue in this case. The evidence clearly shows that Mrs. Prendergast did not sign the Guaranty in this case. This Court makes no finding as to who signed the Guaranty purporting to represent Mrs. Prendergast's signature.

> [P]arties to a contract may agree in advance about the amount to be paid as compensation for loss or injury which may result from a breach of the contract "when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of all proportion to the probable loss."

O'Brian v. Langley School, 256 Va. 547, 551 (1998). "[A] liquidated damages clause will be construed as an unenforceable penalty 'when the damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of actual damages.'" *Boots, Inc. v. Prempal Singh*, 274 Va. 513, 517 (2007). The party challenging the validity of liquidated damages holds the burden of proof. *Id.*

At trial, Defendants failed to meet their burden of proof in challenging the "going dark" liquidated damages. The parties were free to agree to stipulate to damages based upon the impact PGI's failure to open would have on the rest of the shopping center. The Court heard no evidence of what the actual damages were, thus preventing a determination that Article 6.3 awards damages out of proportion to the probable loss, or in excess of the actual damages caused by PGI's "going dark." In fact, the evidence on the issue suggests that the liquidated damages are appropriate. Ms. Vermillion, the owner of PGI, testified that she complained to the landlord that other stores in the center were going dark. According to Ms. Vermillion, other stores closing "made our center look like it was dead by five o'clock and not open on the weekends. That was huge." Trial Transcript, Day 2, p. 179. In light of all of the available evidence on the issue, the Court declines to set aside the Article 6.3 liquidated damages provision.

TIAA successfully proved damages based upon PGI's breach and failure to pay rent. PGI owed $243,238.66 in past rent from August 1, 2018, through June 7, 2020, and $12,161.93 in late fees under Lease Article 19.6. As to the "going dark" provision previously discussed, TIAA is due $109,624.21 in liquidated damages pursuant to Article 6.3, and $5,481.21 in late fees on that amount. TIAA also proved $91,939.73 as damages for lost future rent, representing the difference between PGI's obligation and the amount to be earned from the replacement tenant.[2] TIAA is additionally entitled to the costs associated with securing the replacement tenant in the

[2] TIAA also sought damages under the Lease's Article 19.2 accelerated rent provision. Following PGI's default, TIAA secured a new tenant for the property, and introduced evidence of the difference between PGI's rent and the rent of the replacement tenant. Plaintiff's Exhibit No. 19(A). Having obtained a new tenant for the premises, TIAA cannot recover PGI's full rent for the remainder of the lease. Such recovery would be an unenforceable penalty in gross excess of the actual damages suffered, and permit TIAA to recover, by TIAA's own evidence, $373,113.75 in damages already mitigated. *See, e.g., Teachers' Retirement Sys. v. American Title Guar. Corp.*, 38 Va. Cir. 316, 1996 WL 1065475, at *2 (Fairfax 1996) (determining that an accelerated rent clause allowing a landlord to recover "the entire remaining balance from the tenant and at the same time relet the premises and recover a similar amount from a new tenant" was an unenforceable penalty). It is of no moment that Article 19.2 provides a reimbursement mechanism for rent received from replacement tenants. Defendants cannot be held to insure the replacement tenant's contract; to hold otherwise would be to enforce a penalty not tenable under Virginia law. To the extent that the replacement tenant may fail to meet its obligations, TIAA's remedy is with that tenant.

amount of $23,264.88. Finally, TIAA is owed $6,698.16 in rent from prior to August 1, 2018, and $963.11 in related late fees. Applying interest in the amount of $30,136.74, TIAA proved $514,919.23 in total damages against PGI, after having credited back $7,425.00 on the security deposit and $1,164.40 for interest thereon.

As to Mr. Prendergast, the Guaranty provides for a damages cap. Paragraph 12 of the Guaranty provides:

> The foregoing in this Guaranty notwithstanding, Guarantor's maximum liability under this Guaranty: (a) shall not exceed the sum of: (i) all Minimum Rent, Promotional Fund Charges, Operating Charges, Real Estate Taxes, other additional rent or any other payment due Landlord under the Lease that shall accrue during the twenty-four (24) month period following the date of a default by Tenant under the Lease (or, if later, the date Tenant has fully vacated the Premises and Landlord has regained physical and legal possession thereof), plus (ii) all the obligations of Tenant under the Lease that shall have accrued up to the date of such default (or, if later, the date Tenant has fully vacated the Premises and Landlord has regained physical and legal possession thereof), including without limitation all Minimum Rent, Promotional Fund Charges, Operating Charges, Real Estate Taxes, other additional rent and any other payment due Landlord under the Lease; plus (iii) all costs of enforcement and collection under the Lease and this Guaranty; and (b) shall expire and be of no further effect beginning after the date that is the last day of the one hundred twenty-first (121st) full calendar month after the Rent Commencement Date. All capitalized terms used in this Guaranty that are not defined or described herein shall have the meanings assigned to such terms in the Lease.

TIAA concedes that damages in this case are capped at $403,705.32 against Mr. Prendergast after crediting back the security deposit and accrued interest. Having proven damages in excess of the cap, TIAA is entitled to judgment against Mr. Prendergast in the amount of $403,705.32.

Defenses Offered by PGI and Mr. Prendergast

At trial, Defendants offered several defenses as to why judgment should not be entered in TIAA's favor. No defense offered supports this requested relief; each will be discussed in turn.

Defendants asserted that impossibility of performance excused PGI's nonperformance under the Lease.

Virginia "has long recognized an impossibility defense in contract actions." *RECP IV WG Land Investors LLC v. Capital One Bank (USA), N.A.*, 295 Va. 268, 284 (2018). The doctrine is only available in limited circumstances; in particular, when

> impossibility is due . . . to the fortuitous destruction or change in the character of something to which the contract related, or which by the terms of the contract was made a necessary means of performance, the promisor will be excused, unless he either expressly agreed in the contract to assume the risk of performance, whether possible or not, or the impossibility was due to his fault.

Id. at 284-285. The evidence at trial showed that it was indeed possible for PGI to continue to perform under the Lease. Moreover, the evidence before the Court established that the conditions giving rise to PGI's nonperformance were of PGI's own making.[3] For both reasons, impossibility is not available as a defense in this case.

As to the Guaranty, Defendants raise the argument of unconscionability. Unconscionable contracts are those where "'no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.' The inequality must be so gross as to shock the conscience." *Smyth-Brothers-McCleary-McClellan Co. v. Beresford*, 128 Va. 137, 170 (1920). As Judge Bellows of this Court has opined, "[i]n practice, this means a court will not enforce a contract or contract provision if it is both procedurally and substantively unconscionable. Procedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract. . . . Substantive unconscionability involves unfairness in the terms of the contract itself." *Sanders v. Certified Car Center, Inc.*, 93 Va. Cir. 404, 2016 WL 9076185, at *2 (Fairfax 2016) (internal citations and quotation marks omitted). Whether a contract is an adhesion contract—"a standard form contract, prepared by one party and presented to a weaker party . . . who has no bargaining power and little or no choice about the terms"—is relevant to the Court's consideration of procedural unconscionability. *Id.*

Having considered the evidence, the Court concludes that the Guaranty is not unconscionable. The agreement is not grossly inequitable such that the Court must set it aside on the terms alone. Furthermore, Mr. Prendergast was and remains a sophisticated actor, and the circumstances of formation do not lend themselves to a finding of unconscionability. The Court declines to set aside the Guaranty on this basis.

Defendants also suggest that TIAA failed to prove its burden that it was the successor in interest to the Lease. This argument is unconvincing; TIAA was and is unquestionably the successor in interest. TIAA established this fact at trial by a preponderance of the evidence, as discussed more thoroughly in the Factual and Procedural History section of this Opinion Letter, *supra*.

Finally, Defendants offer a 2014 amendment to the Lease as an express contractual basis releasing them from liability. The Document in question was admitted into evidence as

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[3] *See* Factual and Procedural History, *supra*. The Franchisor did not force Defendants to close the restaurant; PGI worked with the Franchisor to negotiate termination of the franchise agreement. PGI's decision to close was voluntary.

Defendant's Exhibit A. The pertinent language of the agreement is as follows:

> Dear Mr. Prendergast:
>
> As you are aware, disputes previously arose between Prior Landlord and Tenant about, among other things: (i) Tenant's obligation for the payment to Prior Landlord of liquidated damages pursuant to Section 6.3 of the Lease, (ii) Tenant's obligation for the payment to Prior Landlord of certain plumbing expenses incurred by Prior Landlord, and (iii) Prior Landlord's obligation for the payment to Tenant of the remainder of the Improvements Allowance (all of the foregoing, collectively, the "Claims"). In connection with Prior Landlord's sale of the Center (as defined in the Lease), Prior Landlord and Tenant now desire to settle and compromise all claims (including the Claims) that Prior Landlord and Tenant have asserted or could assert against each other in regards to the Lease, without resort to any costly and protracted court proceedings. Now, therefore, Prior Landlord and Tenant agree as follows:
>
> 1) Within five (5) business days after the date last set forth below in this letter agreement (this "Agreement"), Prior Landlord shall pay to Tenant the amount of $15,378.93.
> 2) Both Prior Landlord and Tenant each hereby absolutely and irrevocably releases and forever discharges each other, and each of their respective heirs, assigns, agents, servants, employees, directors, officers, parents, owners (whether direct or indirect), subsidiaries, affiliates, predecessors, successors, assigns, attorneys and insurers of and from any and all foreseen or unforeseen claims, causes of action, damages, costs, liabilities, and losses arising from, related to, or in connection with the Lease, except for the Tenant's indemnification obligations pursuant to Section 15.2 of the Lease (but Section 15.2(c) shall not so survive.). . . . The foregoing notwithstanding, none of the foregoing shall constitute a waiver of any breach of or default under this Agreement by either party.

This agreement was signed by the original landlord, AG/ARC Plaza America Retail Owner, L.L.C., and PGI, with Mr. Prendergast as the signatory. The agreement is dated July 8, 2014.

Defendants urge the Court to treat this document as a release of PGI's liability[4] and as an amendment to the Lease. These arguments fail because TIAA did not sign the agreement. The evidence by way of testimony shows that by the time this document between PGI and AG/ARC was signed, TIAA had already taken over as landlord under the Lease. Just as Mrs. Prendergast cannot be bound by a Guaranty she did not sign, TIAA cannot be bound by an agreement AG/ARC signed after TIAA had succeeded as landlord. This Opinion Letter has previously

[4] After signing this document, PGI continued to pay under the Lease and enjoyed the tenancy rights the Lease secured. To the extent Defendants suggest that the document extinguished the Lease, the Court finds such an argument without merit.

discussed the materiality of mutual assent to any enforceable legal obligation. With that maxim in mind, it is plain that TIAA never expressed any assent to be bound by the terms of a release to which it was not a party. Moreover, the document cannot be construed to amend TIAA's obligation under the Lease; Article 25.1 of the Lease requires that the Lease "may be changed in any manner only by an instrument signed by both parties." TIAA, then the new landlord, did not sign the agreement. The Court need not consider the agreement—it is irrelevant to TIAA's ability to seek damages against Defendants.

Having ruled as to TIAA's claims in this case, the Court now turns to PGI's Counterclaim.

PGI's Counterclaim

In its own Counterclaim, PGI seeks judgment against TIAA for breach of contract under the Lease; additional claims are no longer before the Court.

Having considered the Lease and all of the available evidence, this Court finds that PGI failed to prove by a preponderance of the evidence that TIAA breached any legal obligation it owed to PGI to PGI's subsequent damage. Accordingly, the Court finds in favor of TIAA as to PGI's Counterclaim.

Conclusion

For the reasons previously discussed, this Court awards judgment in favor of TIAA in the amount of $514,919.23 against PGI and $403,705.32 against Mr. Prendergast individually. The Court finds in favor of Mrs. Prendergast with respect to TIAA's claims. The Court further finds in favor of TIAA as it pertains to PGI's Counterclaim.

An Order consistent with this Court's opinion is enclosed. The parties are instructed to contact my law clerk to set a date for hearing on the issue of attorney's fees.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

OPINION LETTER

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,	)	
PLAINTIFF,	)	
v.	)	Case No. CL-2019-876
PRENDERGAST GROUP, INC., *et al.*,	)	
DEFENDANTS.	)	

ORDER

THIS CAUSE came to be heard for trial from February 11 through 13, 2020.

Having considered all the available evidence and the arguments of counsel, is it

ADJUDGED, ORDERED, and **DECREED** for the reasons stated in this Court's Opinion Letter issued contemporaneously with this Order that Plaintiff is awarded $514,919.23 against Defendant Prendergast Group, Inc., and $403,705.32 against Defendant Joseph T. Prendergast. The Court finds in favor of Defendant Rebecca Prendergast as to Plaintiff's claims. The Court finds in favor of Plaintiff as to Defendant Prendergast Group, Inc.'s Counterclaim.

THIS CAUSE CONTINUES.

ENTERED this 17th day of August 2020.

[redacted]

Judge Daniel E. Ortiz

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.