

NOT FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**REVOCABLE TRUST, REPRESENTED BY
MAHMOUD SHARMOUJ AND ZILA SHARMOUJ,**

Plaintiff,

v.

OSU BUCKEYE, LLC,

Defendant.

SX-09-CR-591

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment, filed on November 16, 2010. On November 30, 2010, Defendant filed an Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment. Plaintiff filed a Reply to Defendant's Opposition on December 10, 2010. The Court will treat Plaintiff's Reply to simultaneously serve as an Opposition to Defendant's Cross-Motion for Summary Judgment. Defendant filed a Reply to Plaintiff's Reply on December 20, 2010. On November 8, 2010, the parties also filed a Statement of Stipulated Facts.

FACTS¹

Plaintiff, Samira Sharmouj-Russo,² Nasser Sharmouj a/k/a Raymundo Sharmouj³ owned and operated Target Tire, located at 1K Little Princess, Christiansted, St. Croix, U.S. Virgin Islands (hereinafter, the "Leased Premises"). On March 30, 2007, Plaintiff (landlord) and Defendant (tenant) entered into a Commercial Lease Agreement where the Plaintiff contracted to lease the buildings, improvements and grounds of Target Tire to Defendant. Simultaneously, on March 30, 2007, Plaintiff, Samira Sharmouj-Russo, Nasser Sharmouj a/k/a Raymundo Sharmouj and Defendant entered into an Asset Purchase Agreement where Sellers (Plaintiff, Samira

¹ The following facts are in accordance to the parties' Statement of Stipulated Facts.

² According to the parties' Statement of Stipulated Facts, Samira Sharmouj-Russo is the adult child of Mahmoud Sharmouj and Zila Sharmouj and the additional co-beneficiary to the Revocable Trust.

³ According to the parties' Statement of Stipulated Facts, Nasser Sharmouj is the adult child of Mahmoud Sharmouj and Zila Sharmouj and the additional co-beneficiary to the Trust.

Sharmouj-Russo and Nasser Sharmouj) sold the assets of the business to Defendant. The Commercial Lease Agreement specified many clauses that Plaintiff and Defendant are bound by. One of the clauses labeled "Compliance with Law" specified that "Tenant and Landlord each shall comply with all laws, orders, ordinances and other public requirements now or hereafter affecting the Leased Premises." The Commercial Lease Agreement also required any notices to be "sent by United States certified mail, return receipt requested."

On December 3, 2008, that Department of Planning and Natural Resources (hereinafter, "DPNR") conducted an inspection of the Leased Premises and determined, among other things, that Defendant violated the Solid Waste Management Act, Title 19 V.I.C. §§ 1551-1564, and the rules and regulations promulgated thereunder, for not having a permit to handle used motor oil. On May 11, 2009, DPNR ordered Defendant to do the following within ten (10) days: (1) Procure a permit from DPNR for the storage and generation of used oil; (2) Store used oil and oily materials in a manner that will not result in the contamination of the environment and the waters of the Virgin Islands; (3) Contact a permitted transporter to remove the oil and waste coolant off-site for disposal; (4) Properly cleanup and contain oil spills, soil and oily materials; (5) Store waste tires in a manner that will not invite the breeding of mosquitoes; and (6) Notify in writing the Director for DEP, Nadine Noorhasan, Ph.D., that [Defendant] has complied with the Corrective Actions set forth in this Order, and/or any reason(s) why Target Tire was unable to comply with any of the corrective actions within the time set forth for compliance. On October 27, 2009, DPNR issued a Consent Agreement, which was approved and adopted as an Order of DPNR. The Consent Agreement, *inter alia*, released Target Tires and its officers, agents, directors, employees, affiliates, successors and assigns from liability for the violations specified in Notice of Non-Compliance/Notice of Violation Action No. STX-SW-02-09 from December 3,

2009 to September 25, 2009. DPNR has not asserted that Defendant is currently in violation of any environmental law, regulations or order of DPNR.

On August 3, 2009, Plaintiff hired its own environmental expert to further examine and evaluate the Leased Premises. Plaintiff's environmental expert alleged that, among other things, the presence of hydrocarbons in the soil and hydrocarbons being carried by rainwater runoff and the total petroleum hydrocarbon exceeded leachability levels for ground water, fresh water and marine surface water criteria. Plaintiff notified the Department of Planning and Natural Resources (hereinafter, "DPNR") and Defendant of its environmental expert's findings.

On December 9, 2009, Plaintiff filed a Complaint against Defendant, claiming that Defendant breached the Commercial Lease Agreement when Defendant violated and continued to violate the law. According to the Complaint, Plaintiff alleged that despite DPNR's notice of non-compliance/notice of violation issued after its initial December 3, 2009 inspection of the Leased Premises, Defendant never took any remedial actions. Accordingly, Plaintiff requested the Court to declare the Commercial Lease Agreement terminated for Defendant's failure to comply with the law in accordance with its obligation under the Commercial Lease Agreement.

DISCUSSION

Motion for Summary Judgment

The Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once this showing has been made, the burden shifts to the non-

moving party who cannot rest on the allegations of the pleadings and must “do more than simply show that there is some metaphysical doubt as to the material facts.” *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

A factual dispute is deemed genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Id.* at 247-48. The Court may not make credibility determinations or weigh evidence. *Id.* at 255. If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. In analyzing this motion for summary judgment, this Court must view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Morton Intern., Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 680 (3d Cir. 2003); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000).

Here, the Court finds that Plaintiff did not meet the initial burden of showing that there are no genuine issues as to any material fact that exists concerning its claims against Defendant. Plaintiff asserts that Defendant breached the Commercial Lease Agreement when it failed to adhere to the “Compliance with Law” clause contained therein. Plaintiff claims that Defendant’s violation commenced when DPNR issued a notice of non-compliance in May 2009 and Defendant failed to take any remedial actions. Plaintiff further points out that, Defendant was notified of the results of the evaluation by its privately hired environmental expert by two separate Notices to Cure Default, dated September 10, 2009 and October 20, 2009. Again, Plaintiff asserts that Defendant failed to take any remedial actions. Defendant contends that it did take all the remedial measures ordered by DPNR on May 11, 2009. Defendant points out that DPNR issued a Consent Agreement, that was approved and adopted as an Order, which

released Target Tires from liability for the violations specified in its Notice of Non-Compliance/Notice of Violation Action No. STX-SW-02-09 from December 3, 2009 to September 25, 2009. According to the parties' Statement of Stipulated Facts, DPNR has not asserted that Defendant is currently in violation of any environmental law, regulations or order of DPNR. Furthermore, Defendant argues that Plaintiff failed to give Defendant any notice of termination, which was required under the Commercial Lease Agreement—the two Notices to Cure Default, dated September 10, 2009 and October 20, 2009, did not qualify as termination notices. Defendant also objects to the opinions submitted by Plaintiff's privately hired environmental experts, noting that a *Daubert* hearing is necessary to establish the validity and reliability of said expert opinions. Based on the existing record, viewed in favor of Defendant, a reasonable jury could find that Defendant did not breach the Commercial Lease Agreement. The Court finds that there are genuine issues of material facts regarding Plaintiff's claims against Defendant that should be left to the trier of fact to decide at trial.

The Court will also address Defendant's Cross Motion for Summary Judgment at this time. Similarly, the Court finds that Defendant did not meet the initial burden of showing that there are no genuine issues as to any material fact that exists concerning Plaintiff's claims against Defendant. Based on the existing record, viewed in favor of Plaintiff, a reasonable jury could find that Defendant breached the Commercial Lease Agreement and that the Notices to Cure Default qualified as termination notices. Accordingly, the Court finds that there are genuine issues of material facts in this matter that should be left to the trier of fact to decide at trial.

CONCLUSION

At this stage, viewing the facts and evidence in the light most favorable to Defendant, the Court finds that Plaintiff have failed to meet its initial burden of showing that there are no

genuine issues of material facts that exists in regard to Plaintiff's claims against Defendant. Similarly, viewing the facts and evidence in the light most favorable to Plaintiff, the Court finds that Defendant has failed to meet its initial burden of showing that there are no genuine issues of material facts that exists in regard to Plaintiff's claims against Defendant. Accordingly, the Court will deny Plaintiff's Motion for Summary Judgment and deny Defendant's Cross Motion for Summary Judgment. The Court will issue an order consistent with this Memorandum Opinion.

DONE and so ORDERED this 1st day of April, 2011.

ATTEST:

Venetia Harvey-Velazquez
Clerk of the Court

By: [Signature]
Deputy Clerk

Dated: 4/4/11

[Signature]
HAROLD W. L. WILLOCKS
Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY
This 7th day of April 20 11
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT

By [Signature] Court Clerk 11