SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

GUARDIAN INSURANCE COMPANY, Plaintiff, vs. NAEL AHMAD, MUNIF ASFOUR, and FOUR SEASONS FARM, INC., MOHANNAD ABDEL-SAMAD, SAKER SHALHOUT, DOLPHIN GOURMET MARKET, VENECIA JEWELERS, Defendants.	)	CASE NO. ST-10-CV-238
NAEL AHMAD, Third-Party Plaintiff, vs. LOCKHART GARDENS, INC., JAD M. SHALHOUT, and MOHANNAD ABDEL-SAMAD, Third-Party Defendants.	)	
LOCKHART GARDENS, INC., Plaintiff, vs. NAEL AHMAD, MUNIF ASFOUR d/b/a FOUR SEASONS FARM, INC., Defendants.	)	CASE NO. ST-09-CV-233
MUNIF ASFOUR, Third-Party Plaintiff, vs. JAD M. SHALHOUT, MOHANNAD ABDEL-SAMAD, And FOUR SEASONS FARM, INC., Third-Party Defendants.	)	

MEMORANDUM OPINION

Pending before the Court is Plaintiff Lockhart Gardens' motion for summary judgment in Case No. ST-09-CV-233.[1] For the following reasons, Plaintiff's motion will be granted in part.

FACTUAL AND PROCEDURAL HISTORY

Lockhart Gardens sued the named Defendants for back rent pursuant to a lease agreement. The Complaint was then amended to add a claim of replevin on the grounds that Defendants removed equipment from the leased premises in violation of the lease. In response, Defendant Ahmad filed a crossclaim against Defendant Munif Asfour for indemnity and contribution, and Asfour filed a third-party complaint against Jad Shalhout, Mohannad Abdel-Samad, and Four Seasons Farms, Inc., alleging conversion (Count I); stating a derivative shareholder action (Count II) and a direct shareholder action (Count III); and seeking indemnification (Count IV) and contribution (Count V). The Court subsequently granted Asfour's motion to dismiss his claim against Abdel-Samad and granted Lockhart Gardens and Ahmad's joint motion to dismiss their claims against each other.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Virgin Islands Superior Court through Rule 7 of the Rules of the Superior Court, provides that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

[1] Plaintiff filed its motion on November 3, 2010, and Defendant Asfour filed an opposition on December 7, 2010.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, a court must "draw ... all reasonable inferences from the underlying facts in the light most favorable to the non-moving party."[2] An issue is "genuine" if a reasonable jury could possibly hold in the non-movant's favor with regard to that issue.[3]

ANALYSIS

In his opposition to Plaintiff's motion, Defendant Asfour has admitted to the following facts:

1. Defendants rented property owned by Lockhart Gardens described as Units Nos. 4 and 5, Lockhart Gardens Shopping Center, St. Thomas. More specifically, Defendants operated[4] a gourmet grocery store named Four Seasons Farms at the leased premises.

2. On or about December 28, 2006, Defendants executed a lease agreement with Lockhart Gardens to rent the leased premises. Defendants promised to pay rent monthly, in addition to other charges including, but not limited to, water reimbursements, property taxes, late charges, common area maintenance charges, and finance charges, and further agreed that Lockhart Gardens would have a security interest in all equipment in the event of default.

3. Pursuant to the terms of the lease, Defendants were required to pay Five thousand nine hundred seventy-three dollars and thirty-three cents ($5,973.33) per month

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[2] *Battaglia v. McKendry*, 233 F.3d 720, 722 (3d Cir. 2000).
[3] *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).
[4] Asfour points out that Defendants were not the only individuals to operate Four Seasons, but this fact is immaterial as only Asfour and Ahmad were parties to the lease.

from April 15, 2007 to June 30, 2007. Thereafter, Defendants were required to pay One hundred forty-three thousand three hundred sixty dollars ($143,360.00) per lease year payable in equal monthly installments of Eleven thousand nine hundred forty-six dollars and sixty-six cents ($11,946.66) per month commencing on July 1, 2007. By letter dated September 20, 2007 from Lockhart Gardens' employee Marna Green to the Defendants, the date of commencement for the full amount of rent, common area maintenance charges, and property tax reimbursements totaling Thirteen thousand nine hundred seventy-four dollars and eighty-two cents ($13,974.82) per month was pushed back to October 1, 2007.

4. Defendants failed to make the required monthly payments of rent, common area maintenance charges, water reimbursements, property taxes, late charges, finance charges and other charges due to Lockhart Gardens.

5. Lockhart Gardens made demand upon the Defendants pursuant to the terms of the lease for payment of rent, common area maintenance charges, water reimbursements, property taxes, late charges, finance charges, and other charges.

6. Defendants were forewarned repeatedly of the consequences of their payment defaults including, but not limited to: notices of default dated August 28, 2008, September 24, 2008, November 24, 2008, December 19, 2008, January 22, 2009, February 3, 2009, and February 24, 2009, as well as a notice of termination of lease and a notice to quit and vacate premises dated March 27, 2009, and a letter dated April 14, 2009, demanding Defendants to cure their defaults or vacate the premises but leave all equipment.

7. Defendants are in default under the terms and conditions of the lease.

8. Pursuant to article V, section 5.4 of the lease, Lockhart Gardens was provided with a security interest in all stock-in-trade, inventory, and trade fixtures, including all equipment and machinery located at the leased premises (collectively, the "equipment"). Lockhart Gardens perfected its security interest in the equipment by, among other things, filing a UCC-1 financing statement at the Office of the Lieutenant Governor Recorder of Deeds, on May 12, 2009 as Document No. 20090000435E.

9. Following a hearing on May 26, 2009, this Court entered an Order on June 1, 2009, awarding Lockhart Gardens immediate restitution of the leased premises as a result of a forcible entry and detainer ("FED") action initiated by Lockhart Gardens.

10. As of October 31, 2010, Defendants owe Lockhart Gardens common area maintenance charges in the amount of $38,097.16, finance charges in the amount of $58,004.85, late charges in the amount of $23,826.28, property tax reimbursement in the amount of $10,103.64, past due rent in the amount of $360,087.46, and water reimbursement in the amount of $1,491.90 for a total of $491,611.29. Additionally, rent and other charges continue to accumulate monthly at a rate of $14,014.52, pursuant to section 10.2 of the lease. In addition, interest continues to accrue at the rate of 18% per annum until the Court enters judgment and late charges continue to accrue at the rate of 5% per month until the Court enters judgment. Thereafter, interest will accrue at the statutory rate.

Despite Asfour's admission to $491,611.29 as representing the total amount of his indebtedness as of October 31, 2010, the Court notes that section 10.2 of the lease provides that:

> If this [l]ease shall terminate as provided in [s]ection 10.1, or by or under any summary proceeding or any other action or proceeding, then, in any of said events: (i) Tenant shall pay to Landlord all the [r]ent due to the date upon which this [l]ease shall have terminated or to the date of re-entry upon the [l]eased [p]remises by Landlord, as the case may be.

Under section 10.1(B) of the lease, the Landlord may "re-enter the [l]eased [p]remises either by force or otherwise, and by summary proceedings or otherwise, dispossess Tenant [from] the [l]eased [p]remises as if this [l]ease had not been made." The Court notes that: (1) the June 1, 2009, Order in the FED action awarded Lockhart Gardens immediate restitution of the leased premises, (2) Lockhart Gardens acknowledged that it re-entered the premises on June 1, 2009, and (3) the only delinquency report[5] submitted by Lockhart Gardens indicates that Asfour's total indebtedness was $182,699.80 as of May 31, 2009.[6] As a result, rent and other charges ceased to accrue as of June 1, 2009, and Asfour's total indebtedness to Lockhart Gardens was $182,699.80 as of May 31, 2009, with pre-judgment interest accruing at a rate of nine percent per annum pursuant to 11 V.I.C. § 951(a).

Notwithstanding, Asfour asserts that Lockhart Gardens has failed to mitigate its damages. Specifically, Asfour contends that Lockhart Gardens failed to secure the leased premises after Asfour orally surrendered the premises to Marna Green on March 26, 2009, which led to the loss of equipment.

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[5] See Exhibit A attached to Plaintiff's November 29, 2010, opposition to Defendant's motion to consolidate.

[6] The indebtedness figure included past due rent, common area maintenance charges, finance charges, late charges, property tax reimbursement, and water reimbursement.

In her affidavit, Green asserts that, although the equipment was improperly removed from the premises,[7] "Lockhart Gardens was eventually able to take possession of all the Equipment it was entitled to."[8] Asfour has provided no evidence suggesting that Lockhart did not retake possession of all the equipment it was entitled to possess.

Green also stated in her affidavit that "Lockhart Gardens held a private sale of the Equipment pursuant to 11A V.I.C. § 9-610(b) on July 30, 2010. As a result of the sale, Lockhart Gardens recovered Twenty-three thousand six hundred sixty-five dollars ($23,665.00), but the expense to move the equipment from the Leased Premises to a safe storage area was Thirteen thousand two hundred thirty-eight dollars and fifty cents ($13,238.50)."[9] Conversely, Asfour stated in his affidavit that the equipment was worth over "$500,000.00"[10] and he "disputes that amounts that Lockhart recovered for the equipment."[11]

While Asfour contests the value of the equipment in his affidavit, he provides no evidence concerning the sale that would create a genuine issue of material fact as to the amount Lockhart Gardens recovered for the equipment. As a result, the Court will deduct $23,665.00 from the total indebtedness.

Concerning the transportation expenses of $13,238.50 that Lockhart Gardens claims to have incurred, however, Asfour has raised a genuine issue of material fact as it is not clear when Lockhart Gardens incurred the transportation expenses or for what

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[7] Green asserts that Defendants removed the equipment while Asfour contends that Shalhout and Abdel-Samad were the parties responsible. The Court notes that the factual dispute does not raise a genuine issue of material issue of fact pertaining to Plaintiff's claims or Asfour's defenses.
[8] Green affidavit, ¶ 10.
[9] *Id.*
[10] Asfour affidavit, ¶ 10.
[11] Asfour's opposition to Plaintiff's motion for summary judgment, page 4.

purpose. If the transportation expenses were incurred after the time Lockhart Gardens reacquired the premises on or about June 2, 2009, it would appear that Lockhart Gardens cannot shift those expenses to Asfour.[12]

Based on the foregoing, Asfour's total indebtedness was $182,699.80 as of May 31, 2009, with a pre-judgment interest amount of $61,852.63[13] having accrued until March 5, 2013, the date of this Opinion, minus $23,665.00 for mitigated damages for a total indebtedness amount of $220,887.43. Accordingly, the Court will enter partial summary judgment in favor of Lockhart Gardens in the amount of $220,887.43.

An Order consistent with this Opinion shall follow.

Dated: March 5, 2013

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by: Donna D. Donovan
Court Clerk Supervisor 3-5-2013

[12] Asfour disputes Plaintiff's allegation that Plaintiff reacquired the leased premises on June 2, 2009, asserting that he orally surrendered the premises on May 26, 2009. Pursuant to the common law doctrine of surrender and acceptance, "when a tenant surrenders the premises to a landlord before a lease term expires and the landlord accepts that surrender, the tenant is no longer in privity of estate with the landlord and therefore has no obligation to pay any rents accruing after the date of the acceptance." 26 Am. Jur. Proof of Facts 2d 525 (1981). Here, Asfour has provided no evidence that Lockhart Gardens accepted his oral surrender of the premises prior to June 2, 2009. Notwithstanding, as it relates to Plaintiff's asserted claims, the parties' disagreement over when Plaintiff reacquired the premises does not create a genuine issue of material fact.

[13] Pre-judgment interest accrued in the amount of $16,442.98 per year for a period of three years, and $12,523.69 in interest accrued over for a period of 278 days at $45.0492603 per day.