

VIRGIN ISLANDS

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MEMORANDUM OPINION
February 27, 1985

This action comes before this Court on Motions for Summary Judgment on Cross-Claims by each of the co-defendants.

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For the reasons set forth below, the Motion for Summary Judgment of Esso Standard Oil, S.A., LTD. will be granted while the Motion for Summary Judgment by Cross-defendants Shakir Ghaffery and Francis Laurencin d/b/a S & S Servicenter will be denied.

I.

FACTS

On December 4, 1984 this Court approved a stipulation for Entry of Consent Judgment which provided that each co-defendant pay Two Thousand Five Hundred (\$2,500.00) Dollars to the plaintiff. Subsequently, Esso Standard Oil S.A., LTD. (hereinafter Esso) filed a motion for summary judgment against the cross-defendants, asserting that Esso never was notified in writing, as required by the lease, of any defects in the property which Esso might have been required to correct. Therefore, cross-defendants Shakir Ghaffery and Francis Laurencin, d/b/a S & S Servicenter (hereinafter Ghaffery) should be required to indemnify Esso for the Two Thousand Five Hundred (\$2,500.00) Dollars that Esso paid to Plaintiff Henry. Cross-defendant Ghaffery subsequently filed a motion for summary judgment. He argues that it has been the custom and practice to give oral, rather

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than written notice to Esso of any defective conditions on the premises. Esso in turn would provide the necessary repairs without requiring written notice. Since oral notice was given to Esso of the defective condition of the property prior to the incident, Defendant Ghaffrey claims that Esso should indemnify him for Two Thousand Five Hundred (\$2,500.00) Dollars .

III.

DISCUSSION

Summary judgment is to be entered in a case only if the pleadings, together with the 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). See, Macedon v. Macedon, 19 V.I. 434 (1983). In determining the presence of a disputed issue of material fact on a motion for summary judgment, "all inferences, doubts and issues of credibility" should be resolved against the moving party. Smith v. Pittsburgh Gage and Supply Co., 464 F.2d 870, 874 (3d Cir. 1972). Thus, summary judgment should be granted only in clear cases. Suchomajcz v. Hummel Chemical Co., 524 F.2d 19, 24 (3d Cir. 1975). If the evidence presented in the motion either is

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subject to conflicting interpretations or might induce reasonable men to differ as to its significance, summary judgment is improper. Bragen v. Hudson County News Co. Inc., 278 F.2d 615, 618 (3d Cir. 1960).

In Esso's Motion for Summary Judgment, Esso asserts that it was not notified in writing, as required by the lease agreement, of any defects in the property which Esso might have been required to correct. The lease agreement on page 4 paragraph 7 section(a) explicitly states that written notice is required: ". . . when lessee shall have given Esso written notice of the existence of a defective condition for the repair of which Esso is responsible under this lease". (emphasis added). Cross-defendant Ghaffery asserts that the custom and practice of oral notification overrode the specific provision of a contract requiring written notice.

In the interpretation of an agreement or a term, express terms are given greater weight than the course of performance. Restatement (Second) of Contracts, Section 203(b) (1979). Unless a different intention is manifested, words are interpreted with its generally prevailing meaning. Restatement (Second) of Contracts, Section 202 (3) (1979). When the parties have adopted a writing as a final expression of their agreement, an interpretation is directed to the meaning of that writing in light of the circumstances. In

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interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position the parties occupied at the time the contract was made.

In the case at bar there is no indication that either the lease was not a final expression or that the word "written" was not to be interpreted within the prevailing meaning. This Court finds that at the time the contract was made, the intention of the parties was that written notice would be required.

Some courts have allowed commercial conduct to supplement or qualify express terms, and in certain circumstances, override express terms. Corenswet, Inc. v. Amana Refrigeration Inc., 544 F.2d 129 (5th Cir. 1979), cert denied, 101 S. Ct. 288 (1980) citing J. White & R. Summers, Handbook of the Law under the Uniform Commercial Code, Section 3-3 at 84 (1972). There is no justification for overriding an express term unless the Court finds that the parties' conduct has given rise to promissory estoppel. A conflicting course of dealing can not control over an express contract term.

The Restatement provides that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is

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given great weight in the interpretation of the agreement". Restatement (Second) of Contracts, Section 202(4) (1979). While cross-defendant Ghaffery alleges that Esso acquiesced in, without objection, to the oral notice and thus modified the contract, there is nothing in the record to indicate how this contention can be squared with the express contract language which states that "[n]o waiver by either party of any breach of any of the covenants or conditions herein contained to be performed by the other party shall be construed as a waiver of any succeeding breach of the same or any other covenant or condition." (Defendant's Exhibit A)

In light of the discussion above, this Court grants Esso's Motion for Summary Judgment.


EILEEN R. PETERSEN
Judge