

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

UNITED CORPORATION,

Plaintiff,

vs.

**SALEH MUSTAFA d/b/a ALI
HARDWARE,**

Defendant.

CIVIL NO. 838/1993

**ACTION FOR COLLECTION OF
BACK RENT**

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MEMORANDUM OPINION

(Filed: May 6, 1997)

THIS MATTER comes before the Court on plaintiff United Corporation's motion for partial summary judgment against defendant Saleh Mustafa. Defendant failed to respond to said motion and United filed a motion to deem motion for summary judgment conceded. Plaintiff seeks to have defendant's counterclaim dismissed since defendant cannot prevail on the merits of his claims.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 19, 1993, Plaintiff filed a complaint against former United Corporation tenant,

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Saleh Mustafa. Plaintiff claims that defendant breached his lease with United Corporation when defendant abandoned his store without paying rent and maintenance fees due under the leases. Plaintiff also seeks damages for physical and structural damages to the rented premises caused by defendant.

Defendant, in his answer filed on November 16, 1993, asserted a number of affirmative defenses, including the statute of limitations, laches, estoppel, constructive eviction, and breach of the lease. He also asserted a counterclaim against Plaintiff (Civil No. 56/94). The counterclaim asserted that on or about January 4, 1992, a fire destroyed Plaza Extra Supermarket and other United Shopping Plaza stores, that defendant's store, Ali Hardware, suffered extensive damage and had to close for approximately four (4) consecutive months following the fire, and that when the defendant attempted to reopen his store, he was prevented from doing so on many occasions because of construction taking place by Plaintiff in the shopping center. Defendant also claims that the activities associated with the construction created hazards and obstructions to defendant's customers, thereby making it impossible for Defendant to carry on his business. Defendant claims he was forced to abandon his location in the United Shopping Plaza because of the hazardous conditions created by plaintiff. Accordingly, defendant alleges that Plaintiff breached the lease agreement with him by constructively evicting him from the premises in that Plaintiff made it impossible for him to carry on his business while Plaintiff was engaged in construction or reconstruction in the United Shopping Plaza, specifically the Plaza Extra Supermarket.

On April 7, 1995, United Corporation filed a motion for Summary Judgment against defendant. The motion is premised on the allegation that the lease agreement signed between the

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parties bars any chance of recovery for the defendant. On November 13, 1995, Plaintiff filed a motion to deem the motion for summary judgment conceded and to dismiss defendant's counterclaim against United Corporation. On November 24, 1995, defendant filed an opposition to Plaintiff's motion to deem motion for summary judgment conceded as well as a motion requesting an enlargement of time to respond to plaintiff's motion for summary judgment. Defense counsel stated that he inadvertently neglected to file an opposition to the summary judgment motion. On December 6, 1996, this Court entered an Order denying defendant's motion for an enlargement of time.

DISCUSSION

United Corporation moves for summary judgment against defendant alleging that under the clear and unambiguous lease agreement between the parties, (1) defendant waived all damage claims against United and (2) defendant was not constructively evicted. Defendant failed to oppose plaintiff's summary judgment motion and plaintiff now asks the Court to deem plaintiff's motion for summary judgment conceded and grant its summary judgment motion against defendant. The Court must therefore decide whether defendant is precluded from seeking damages against plaintiff by virtue of the exculpatory clauses contained in the lease agreement between the parties. Additionally, this Court must determine whether defendant can prove he was constructively evicted by plaintiff during plaintiff's reconstruction of the United Shopping Plaza.

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A. LRCi 7.1(j) Standard

LRCi 7.1(j) states

Upon failure of respondent to file a response and brief in opposition to the motion, the court may treat the motion as conceded and render whatever relief is asked for in the motion.

LRCi 7.1(j)(1997).

The purpose of Rule 7.1(j) is not to impose or authorize a sanction for failure to prosecute or defend; rather, the rule's purpose is to facilitate the court's disposition of motions. Anchorage Associates v. V.I. Board of Tax Review, 922 F.2d 168, 174 (3d Cir. 1990). Nevertheless, local rules must be construed and applied in a manner consistent with the Federal Rules of Civil Procedure. See 28 U.S.C. §2071. At present, United has moved for summary judgment against Defendant Mustafa. Therefore, Rule 7.1(j) must be construed against and applied in a manner with Fed. R. Civ. P. 56 which requires a finding that judgment for the moving party is "appropriate." Anchorage, 922 F.2d at 174-175.

Where the moving party has the burden of proof on the relevant issues, this means that the court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Id. at 175. Where the moving party does not have the burden of proof on the relevant issues, this means that the court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law. Id. Finally, a local rule like 7.1(j) can and should be construed as effecting a waiver of the opponent's right to controvert the facts asserted by the moving party in the motion for summary judgment or the supporting material accompanying it. Id. at 175-176.

B. Validity of Exculpatory Clauses

Plaintiff claims that under the unambiguous provisions of the lease, Ali Hardware provided a complete waiver of any rights against United. It points to several portions of the lease that evidence the intent of Ali Hardware to waive its rights to recover against United. The relevant provisions of the lease are as follows:

ARTICLE IX, Indemnification

Section 1. Liability Insurance. Tenant further agrees...to carry fire insurance with such extended covering all of Tenant's fixtures, furniture, furnishings, floor covering and equipment in the Demised Premises for one hundred (100) percent of their insurable value...

...and tenant agrees to procure a waiver of rights of subrogation against Landlord and Tenant on the part of all insurance carriers in connection with all insurance policies covering losses arising out of destruction or damage to the Demised premises or its contents or to other portions of the Shopping Plaza.

Section 2. Non-Liability of Landlord. Tenant agrees that landlord and Landlord's agents and employees shall not be liable for, and tenant waives all claims for, damage to person or property sustained by Tenant or any person claiming through Tenant resulting from any accident or occurrence in or upon the demised Premises or the building of which they shall be a part, or any other part of the Shopping Plaza, including but not limited to claims for damage resulting from:...

Section 3. Tenant agrees...that the Landlord shall have no responsibility or liability for any loss of or damage to fixtures or other personal property of Tenant, arising from any cause whatsoever, including, without limitation, loss by theft or otherwise.

ARTICLE XI, Damage or Destruction

Section 1. Fire or Other Casualty. In the event the Demised Premises should be damaged by fire, explosion or any other casualty or occurrence covered by Landlord's insurance to an extent which shall be twenty-five (25) percent

or less of the cost of replacement of the Demised Premises, Landlord may elect either to repair or to rebuild the Demised Premises or the building or buildings to terminate this lease upon giving notice of such election in writing to Tenant within ninety (90) days after the happening of the event causing the damage.

Section 3. Restoration. With respect of Sections 1 and 2 of this Article XI, if Landlord is required or elects to repair and/or rebuilding an amount in excess of the insurance proceeds recovered or recoverable as a result of such damage, it being understood that Landlord insures the Demised Premises and the buildings of which the Demised Premises are a part to the extent of at least eighty (80) percent of their fully insurable value, and Landlord's obligation to repair and/or rebuild shall in any event be limited to restoring Landlord's Work as described in Exhibit C to substantially the condition in which the same existed prior to the casualty subject, however, to zoning laws and building codes then in existence, but Landlord shall not be responsible for any delay which may result from any cause beyond its reasonable control.

An exculpatory clause in real estate leases generally refers to a clause which concerns the risk of harm sustained by the tenant which might be caused by the landlord and which acts to deprive the tenant of his right to recover damages for such harm by releasing the landlord from liability for certain future acts of negligence by the landlord which might result in harm to the tenant. John D. Perovich, Annotation, Validity of Exculpatory Clauses in Lease Exempting Lessor from Liability, 49 A.L.R. 3d 321 (1973). It is generally accepted that an exculpatory clause is valid where three conditions are met:

- 1) the clause must not contravene public policy;
- 2) the contract must be between persons relating entirely to their own private affairs;
and
- 3) each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion.

Topp Copy Products, Inc. v. Singletary, 626 A.2d 98, 99 (Pa. 1993).

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This general rule is often based upon the broad public policy of freedom of contract. 17 C.J.S. *Contracts* §262 p.1163 (1963). Accordingly, a number of cases have held that an exculpatory clause may be void as unconscionable, or as an attempt to exculpate the landlord from all conceivable wrongs, or where the tenant was either unaware of the clause or lacked a true understanding of its effect. *Perovich*, 49 A.L.R. 3d at 326.

The Restatement's position on exculpatory clauses is summarized in §195 of the Restatement (Second) of Contracts. Section 195 states

- (2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if
 - (a) the term exempts an employer from liability to an employee for injury in the course of his employment;
 - (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or
 - (c) the other party is similarly a member of a class protected against the class to which the first party belongs.

RESTATEMENT (SECOND) OF CONTRACTS §195 (1981).

In interpreting exculpatory clauses, courts have utilized the following standards:

- 1) the contract language must be construed strictly, since exculpatory language is not favored by the law;
- 2) the contract must state the intention of the parties with the greatest particularity, beyond doubt by express stipulation, and no inference from words of general import can establish the intent of the parties;
- 3) the language of the contract must be construed, in cases of ambiguity, against the party seeking immunity from liability; and

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- 4) the burden of establishing the immunity is upon the party invoking protection under the clause.

See Dilks v. Flohr Chevrolet, 192 A.2d 682 (1963); 17 C.J.S. at 1160-1161.

In the case of Mayfair Fabrics v. Henley, 226 A.2d 602 (N.J. 1967), the Plaintiff, after incurring a fire loss to his leased premises, filed a complaint seeking damages on the ground that the fire resulted from negligent work of the defendants. The defendants, in their answer, asserted an affirmative defense based on the exculpatory provision in paragraph 28. Paragraph 28 stated

It is mutually agreed that the landlord will insure the building against fire and the tenant agrees to carry fire insurance upon all equipment and personal property used, placed or stored in, on or near, the leased premises and in no event shall the landlord be responsible or liable for loss or damage to the tenant's property by fire, explosion, or otherwise.

The New Jersey Supreme Court affirmed dismissal of the action by holding

Paragraph 28 was patently designed to place responsibility for fire damage to the tenant's property entirely on the tenant who was to carry fire insurance thereon. The responsibility for the building was that of the landlords who were to insure it against loss by fire, with a privilege to declare the lease void if they could not obtain fire insurance at standard rates because of the hazards of the tenant's business. The distribution of the risks entailed no elements of injustice and did not conflict with the public interest. It was a private contractual arrangement fairly and freely entered into and which the common law would sympathetically carry out in accordance with the contemplation of the parties.

Id. at 605.

The Court also dismissed Plaintiff's claim that paragraph 28 did not specifically refer to actions grounded on negligence and should be inapplicable here. The Court concluded

It cannot fairly be doubted that, when the parties here allocated the fire risk and the obligation to insure, they had in mind fires caused by human negligence, as most of them are, as well as fires resulting from the so-called acts of God.

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Id. at 606.

The New Jersey Supreme Court affirmed its Mayfair holding in the case of Swisscraft Novelty Co., Inc. v. Alad Realty Corp., 274 A.2d 59 (N.J. 1971). The case involved a controversy between insurance companies, for the respective parties, as to which carrier is liable for losses sustained by the tenant resulting from water damage to its merchandise. The exculpatory-indemnification provision read as follows:

The Landlord shall not be responsible for the loss of or damage to property, or injury to persons, occurring in or about the demised premises, by reason of any existing or future condition, defect, matter or thing in said premises or the property of which the premises are a part, or for the acts, omissions or negligence of other persons or tenants in and about the said property. The tenant agrees to indemnify and save the Landlord harmless from all claims and liability for losses of or damage to property, or injuries to persons occurring in or about the demised premises.

The Plaintiff attempted to argue that "absent an agreement to carry insurance, there can be no immunization under an exculpatory clause." Id. at 62. The Court dismissed this argument by holding that

the central question is not whether the parties agreed to insure against loss the risks they severally assumed inter sese but, rather, whether they so clearly allocated the risks that each party knew, or should have known, the existence of its contingent liability and was thus placed in a position where it could protect itself against such loss by adequate insurance coverage or otherwise.

Id.

In the case sub judice, plaintiff, in his argument that the lease exculpates it from liability for acts of its own negligence, draws comparisons with this case to that of Mayfair Fabrics v. Henley.

Specifically, Plaintiff argues that these provisions reflect a careful counterbalancing and match between the duties of each party to obtain insurance covering certain risks of loss, and its obligation

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to repair and restore those elements following a loss due to fire or other insurable risk. Plaintiff continues by stating that the parties clearly intended that each was to provide insurance covering the elements for which each was responsible, to use the proceeds of their insurance to rebuild for their mutual benefit following a fire loss, and to look solely to the insurance, and not to sue each other, for such losses.

The exculpatory provisions found in the lease meet the three general conditions of validity. First, the provisions do not contravene Virgin Islands public policy. The Third Circuit and Virgin Islands case law have upheld the validity of contracts that indemnify the indemnitee "from any and all liability, damages, claims, suits or actions and also recognizes the rights of parties to a business transaction to shift the risk of loss to one party or another. See Eastern Lines Inc. v. The Insurance Company of North America, 758 F.2d 132,135 (3d Cir. 1985). Second, the lease entered into between the parties relates entirely to their own private affairs in that the lease details what the rights and duties of the parties are with respect to defendant's store. Finally, there is no evidence that the contract is one of adhesion.

When reviewing the relevant sections of the lease, Article IX evidences defendant's intent to agree to the following:

- 1) to insure against fire all of his interest in the premises and to waive his rights of subrogation against United;
- 2) to waive all claims for damage to person or property sustained by him resulting from any accident or occurrence in or upon any part of the Shopping Plaza;
- 3) United shall have no responsibility or liability for any loss or damage to fixtures

or personal property of tenant arising from any cause whatsoever...

Sections 1-3 of Article IX clearly state that defendant shall not hold United liable for any damage or loss suffered by defendant to his leased premises arising from accident or any other cause. In particular, like Mayfair, the fact that defendant was required to insure his premises for 100% of its insurable value and to waive all subrogation rights shows that the defendant agreed to look solely to his insurer for any loss suffered by him. The only obligation on the part of plaintiff in the event that United Shopping Plaza should be damaged by fire was to either 1) repair or rebuild damaged premises or 2) terminate lease upon 90 days written notice to Tenant. Plaintiff elected to rebuild upon receiving its insurance proceeds and did so. With such detailed provisions concerning the obligations of both parties to insure their respective interest against fire and the broad waivers of liability, defendant cannot say that he did not waive his rights to hold United liable for damages caused by fires. Having contractually agreed to waive his rights against United, defendant cannot pursue a claim against plaintiff for damages caused to its store as a result of the fire.

C. Constructive Eviction

Ali Hardware claims that plaintiff breached the lease agreement with defendant from the premises in that Plaintiff made it impossible for defendant to carry on business while plaintiff was engaged in construction or reconstruction in the United Shopping Plaza. In essence, defendant was constructively evicted from plaintiff's premises.

Restatement (Second) of Property §5.3 defines what constitutes a constructive eviction. It states

Except to the extent the parties to a lease validly agree otherwise, there is a breach

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of the landlord's obligations if, after the tenant's entry and without fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair, or caused suddenly by a nonmanmade force, makes the leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation within a reasonable time after being requested by the tenant to do so.

Constructive eviction can exist where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive tenant of the beneficial use and enjoyment of the premises. Greenaway v. Johnson, 15 V.I. 195,209 (Terr.Ct. 1978). As a general rule, the mere fact that the premises are unfit for the purpose of the lease does not warrant the tenant in leaving, and is not a constructive eviction. 49 AM. JUR. 2D *Landlord and Tenant* § 644 (1995). It must appear to have been the intention of the Landlord to deprive the tenant of possession or permanently to interfere with tenant's beneficial use or enjoyment of the whole or a part of the premises. Id. at §645. Intent to evict may be implied by or inferred from the character of the acts of the landlord if the necessary and reasonable consequences deprive the tenant of the beneficial enjoyment of the premises. Id.

The general rule is that abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction based upon that wrongful act, or to defend against liability for rent, on account of such act. Id. at §646; See Greenaway, 15 V.I. at 211. However much the tenant may be disturbed in the beneficial enjoyment of the premises by the landlord's wrongful act, there is no constructive eviction if the tenant continues in possession of the whole of the premises. 49 AM JUR 2D at §646. Possession must be given up by the tenant in consequence of the Landlord's acts, and these acts must be such

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as to justify the tenant in doing so. Id. In addition, a tenant's failure to vacate within a reasonable time acts as a waiver of any alleged constructive eviction. Id. at §647. The burden of showing that vacation of the leased premises took place in a reasonable time is on the tenant and said reasonable time is measured as of the time when facts constituting the eviction are brought to the tenant's notice. Id. There is no specific time period that constitutes a reasonable time as a matter of law and whether abandonment was within a reasonable time is ordinarily a question of fact, dependent on the circumstances of each case... Id.

In an action for recovery of unpaid rents, the burden is upon the tenant to plead and prove the defense of constructive eviction by a preponderance of the evidence.

On January 4, 1992, a fire destroyed Plaza Extra Supermarket and other United Shopping Plaza stores. Defendant's store was severely damaged and was closed for four months. United forgave all rents for the month of January. On January 29, 1992, United confirmed an oral promise it had made on January 18, 1992 at a meeting of tenants. The promise was that any tenant that wanted to cancel its lease would be given 30 days to do so and could have an additional 30 days to vacate premises. United claims that it stated in a letter to its tenants that traffic into the shopping center would undoubtedly be diminished due to the destruction of the anchor tenant, Plaza Extra and United was willing to allow any tenants to depart so as to avoid the hardships to them.

After the fire, United erected a fence around the damaged areas to both secure the area and improve the appearance of the remaining portions of the shopping center. United began rebuilding the destroyed portions of the shopping center when it received its insurance proceeds. The fence took up a portion of the common parking lot but did not physically block access to any tenant's

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premises. Despite the construction, defendant continued to occupy his space at United shopping center until August 1, 1993 (18 months post accident), at which time he returned the keys to the premises and moved into a new space down the road from the shopping center.

From the undisputed facts, the Court concludes that it was not the intention of the Landlord, United, to deprive the Tenant, defendant, of possession or permanently to interfere with tenant's beneficial use or enjoyment of the whole or a part of the premises. Plaintiff warned defendant of construction that would take place and offered him an opportunity to terminate the lease. In addition, defendant failed to abandon the premises within a reasonable time. Although defendant had to close his store down for approximately four (4) months after the fire, he remained at the premises for an additional fourteen (14) months (total of 18 months post fire). Defendant's failure to vacate within a reasonable time acts as a waiver of any alleged constructive eviction. In addition, defendant has not shown that the Landlord committed a wrongful act. Defendant's use of the leased premises for 18 months after the fire evidences the tenantability of the store. Accordingly, defendant has failed to prove evidence that the plaintiff constructively evicted him during the time that it was engaged in the reconstruction of the United Shopping Plaza.

CONCLUSION

Under the clear and unambiguous provisions of the lease agreement entered into by the parties, defendant waived its rights to recover damages against United. The exculpatory clauses included in the lease meet the general requirements of validity and it is clear that the language of the lease evidences that the defendant was to bear the risk of loss for his inventory, agreed to insure it,

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and covenanted that he would not sue United for any claims. In addition, defendant has failed to meet his burden of showing that the plaintiff constructively evicted him from his store at the United Shopping Plaza since it does not appear that (1) it was the intention of the landlord, United, to deprive the defendant of possession or permanently to interfere with defendant's beneficial use or enjoyment of the whole or a part of the premises and (2) the plaintiff committed a wrongful act. Accordingly, partial summary judgment should be entered in favor of the plaintiff and defendant's counterclaim should be dismissed as defendant cannot prevail on said counterclaim.



MARIA M. CABRET
Territorial Court Judge