NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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April 6, 2020

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Re: *Ebadom VA, LLC, et al. v. Steve S. Lee, et al.*
Case No. CL–2018–1535
(Consolidated with CL-2018-2399 and CL-2018-3455)

Dear Counsel:

In this landlord-tenant dispute, the issue before the Court[1] is whether 1004 Palace Plaza, LLC ("Landlord") is entitled to attorney fees per its lease,[2] and if so, how much from Ebadom Food, LLC ("Tenant") or Ebadom VA, LLC ("Assignee") (collectively "Tenants").

The Court previously found Landlord entitled to $2,034,737.76 in damages. In addition, the Court now finds Landlord is entitled to attorney fees in the amount of $1,233,069.58.

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[1] Prior to trial, the Court agreed to bifurcate the issue of attorney fees. On January 15, 2020, the Court issued a bench ruling as to most causes of action. Thus, the sole remaining issue to adjudicate now is the issue of whether attorney fees should be awarded and, if so, in what amount.

[2] The Court stated from the bench, and recorded in a bench verdict form, that it awarded attorney fees to Landlord. However, this ruling was premature as it did not have the benefit of the extensive briefing and argument of counsel on the issue. Since no final order has yet been issued, the Court hereby reconsiders its bench ruling on its awarding attorney fees.

OPINION LETTER

I. The Parties Contractually Agreed to an Award of Attorney Fees.

All three parties contractually agreed to an award of attorney fees, as seen in both the original lease and the assignment.

The November 21, 2016, lease ("Lease") between Landlord and Tenant reads:

> 2701. Litigation Costs. Should an Event of Default occur and/or should Landlord file suit against Tenant for any reason, including but not limited to, a suit for possession of the Premises, payment of rent, damages, or to enforce or interpret the provisions of this Lease, then Tenant shall reimburse Landlord for the reasonable attorneys' fees and all expenses and costs of litigation, including any appeals. If suit is filed for past due Rent and/or money damages, Landlord shall be entitled to attorneys' fees in an amount not less than fifteen percent (15%) of the monies awarded to Landlord.

The August 11, 2017, assignment of the Lease ("Assignment") between Landlord, Tenant, Assignee, and Hyun-Ho Kim ("Guarantor"), reads:

> 14. Enforcement. Landlord shall be entitled to its reasonable attorneys' fees and court costs in connection with Landlord's enforcement of the terms and provisions of this Agreement.

Tenant and Assignee are each related to the same South Korean restaurateur. Guarantor to the Assignment is also the signatory to the Lease on behalf of Tenant.

II. The Attorney Fees Provisions are Conscionable.

Tenants argue the terms of the attorney fees provisions are unconscionable because they are not limited to Landlord prevailing. Moreover, they argue, the Lease and Assignment were contracts of adhesion, abusive of an unbalanced sophistication of the parties. The Court finds the provisions are conscionable.

A recent opinion from the Honorable David Bernhard of this Court, affirmed by an unpublished Order of the Supreme Court of Virginia, held a contract of adhesion between a private school and the parents of a student contained an unconscionable attorney fees provision. *McIntosh v. Flint Hill Sch.*, 100 Va. Cir. 32 (Fairfax 2018), *aff'd*, *Flint Hill Sch. v. McIntosh*, No. 181678, 2020 WL 33258 (Va. Jan. 2, 2020).

The Court distinguishes *Flint Hill School* from the present case in three ways.

First, Tenants are related offspring to the same very large restaurant operator boasting 200 locations in and outside South Korea. With multiple restaurants and the resources of a major company, they are far removed from the comparatively unsophisticated private school parents of *Flint Hill School*. The fact that the present Lease was Tenant's first in the United States is of no moment. The Court finds no inequality of bargaining power; Tenants and Landlord are each sophisticated in business. In many ways, Tenants were the more sophisticated parties.

Second, the Lease was not a contract of adhesion, as was the contract in *Flint Hill School*. Tenant negotiated significant changes to the contract. (*See* Lease Ex. C.)

Third, the contract in *Flint Hill School* permitted the school to collect attorney fees even if a parent sued it and it lost. The contract read, "We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract." *Id.* at 33. The Lease does not do this. Rather, it is a vanilla attorney fees provision that permits a landlord to seek reimbursement of fees and costs should a tenant default or should the landlord need to file suit against the tenant. Unlike the *Flint Hill School* mandate to pay "all" attorney fees, the Lease only required Tenant to pay "reasonable" attorney fees. Had Landlord sued and lost it would have a hard time persuading a court its fees were reasonable under the "results obtained" consideration prong of the *Chawla* factors. *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623 (1998).[3] The fact the provision is not mutual in the context of this case is merely one of contract negotiations. Tenant simply chose not to negotiate a mutuality component to the attorney fees provision. Presumably, Tenant got some other benefit in the Lease it prized *ex ante* more than attorney fees mutuality.

III. Attorney Fees are Limited to the Virginia State Litigation.

This lawsuit involved proceedings in both state and federal court. The federal court proceedings remain pending. Everyone seems to agree the two proceedings are parallel. Landlord seeks attorney fees from both, now, in state court.

The Court defers to its federal relative for a decision on attorney fees incurred there. Theoretically, the federal court could render judgment opposite to that of this Court. This could be the product of a differently developed record, or a plain disagreement with this Court's judgment. Should this Court award fees from the federal action, and should the federal court find for Tenant or Assignee, this Court's award would be truly unfair. Furthermore, the federal court is in the best position to determine the reasonableness of work performed there. This Court need not hamstring it.

Therefore, this Court will not award fees incurred to prosecute or defend the federal action. However, where legal work performed for Landlord in state court also incidentally benefitted Landlord's case in federal court, it may recover fees for those services.

IV. Attorney Fees Include Fees Necessary to Defend Against Tenants' Claims.

Tenant and Assignee claim that any Landlord fees are limited to those necessary to bring the enforcement action and not those to defend against Tenants' claims. The Court disagrees.

Landlord commenced litigation by filing an unlawful detainer lawsuit in the General District Court. Tenants filed a counterclaim. And by the time this matter went to trial in this

[3] *See infra* Section VI for a discussion of these factors.

Court, there were three consolidated lawsuits and a variety of claims by Tenant, such as breach of contract, fraud, and statutory business conspiracy.[4]

The Lease provides for reasonable attorney fees resulting from an event of default and/or Landlord filing suit against Tenant. (Lease § 2701.) It specifically provides a list of nonexclusive examples of recoverable fees: (1) a suit for possession; (2) payment of rent; (3) damages; or (4) enforcement or interpretation of the provisions of the Lease. (*Id.*) In this case, Landlord incurred fees for all four examples. First and second, Landlord filed an unlawful detainer action in the General District Court, which commenced the litigation between the parties for possession and unpaid rent. Third, Landlord successfully sought significant damages to its building in the form of incomplete build-out work. Fourth, Landlord successfully litigated both enforcement and contract interpretation claims. Tenants set forth their own claims of breach of the Lease and breach of the Assignment, which required Landlord to ask the Court to "enforce or interpret" the Lease.

This fourth category most clearly supports Landlord's claim for fees related to its defense against Tenants' tort claims. For example, it is true that a fraud in the inducement claim is inherently outside the contract allegedly procured by fraud. Had Tenants successfully proved fraud, the award of fees would be different. However, we now know there was no fraud. Nonetheless, Landlord could not enforce its Lease without first defending Tenants' wrong claims of fraud. This makes the defense against the fraud claims inextricably intertwined with enforcement of the Lease. Since Landlord may recover fees related to enforcement of the Lease, it may recover these fraud count-related fees. The same analysis applies to Tenant's conspiracy claims that we now know were wrong, too.

In any event, Virginia law considers defense of a tenant's breach of contract claim to constitute "enforcement" of the agreement for the purposes of recovering fees. *Chawla*, 255 Va. at 621 (permitting attorney fees for successful defense under fee provision providing for recovery of fees incurred enforcing the terms of the lease).

Landlord is entitled to fees for both prosecuting and defending this case.

V. Fees Related to Steve Lee and Annandale Properties, LLC.

Tenants argue attorney fees incurred for Defendants Steve Lee and Annandale Properties, LLC may not be shifted because neither party was a signatory to the Lease or Assignment containing the fee shifting provisions. The Court agrees.

Landlord tries to tie these two parties to the Lease and Assignment by arguing Tenants sued them only to improperly gain leverage in the litigation against Landlord. Even assuming this to be true, however, defending Mr. Lee and Annandale Properties was not a necessary

[4] Procedurally, the case ultimately went to trial on Tenants' claims and Landlord's counterclaims. However, this is just form.

condition to Landlord enforcing its Lease, as was the case for Landlord to defend against Tenants' tort claims. In the former instance, Landlord could enforce its Lease whether Mr. Lee or Annandale Properties defended themselves or not; in the latter instance, tort defense was a necessary condition precedent to Landlord's enforcement of the Lease.

In any event, where legal work performed for Landlord also benefitted Mr. Lee or Annandale Properties, Landlord is entitled to recovery of fees it would have expended had Mr. Lee or Annandale Properties been absent from the lawsuit. If Landlord had to incur the fees to defend itself, Tenants are contractually obligated to reimburse. Tenants cannot point to a third-party beneficiary (Mr. Lee and Annandale Properties) as an excuse to reduce their financial obligation to Landlord.

Tenants take their argument a bit too far by arguing most of the attorney bills were incurred by Mr. Lee and Victoria Lee—as individuals and not as Landlord's owner—because they were addressed to them and not Landlord, the company. The Court finds that the attorney fee bills were directed to Landlord and not to the Lees as individuals, or to Annandale Properties. It reaches this conclusion for three reasons. First, companies operate through individuals. In this case, the Lees are the individuals who run Landlord. It is natural that a bill would be directed to the people running a small limited liability company like that of Landlord. Second, Landlord paid the bills. In notations on some of the bills, this is expressly stated—Landlord was payor. Third, the subject of the bills predominately relate to work for Landlord and not the Lees, individually, or Annandale Properties. The Court was unpersuaded by Tenants' argument that the attorneys predominately worked on behalf of the Lees and Annandale Properties as opposed to Landlord.

VI. Landlord is Entitled Only to Reasonable Attorney Fees.

Tenants correctly argue Landlord has the burden to prove its attorney fee request is reasonable. Landlord retorts that it has so met its burden. The Court generally agrees, with a few exceptions.

In calculating a reasonable attorney fee, the Court is guided by "seven non-exclusive factors," otherwise known as the *Chawla* factors: "(1) the time and effort expended by the attorney, (2) the nature of the services rendered, (3) the complexity of the services, (4) the value of the services to the client, (5) the results obtained, (6) whether the fees incurred were consistent with those generally charged for similar services, and (7) whether the services were necessary and appropriate." *Denton v. Browntown Valley Assocs., Inc.*, 294 Va. 76, 88 (2017) (quoting *Lambert v. Sea Oats Condo. Ass'n, Inc.*, 293 Va. 245, 254 (2017)) (internal quotations removed) (discussing the *Chawla* factors). In addition, the Court may "deduct from the award any fees and expenses associated with claims and defenses the court views to be frivolous, spurious, or unnecessary." *Dewberry & Davis, Inc. v. C3NS, Inc., et al.*, 284 Va. 485, 496 (2012). The Court has considered and carefully weighed each and every one of these factors in determining a fee award.

Tenants complain, generally, of block billing and redacted entries frustrating its ability to agree or object to reasonableness of them. Tenants' objections are by category and in the aggregate; Tenant does not highlight specific line items. Even so, the Court makes its own independent review of attorney fee requests. Aided by expert witness evidence in the record and its own knowledge of the trial as presiding judge, the Court is permitted to independently assess the reasonableness of fees as line items and as the entire award. Where the Court cannot understand the substance or gist of a line item due to redactions, or where it finds it cannot conclude a particular block billed item is reasonable, the Court may cut them from its calculation of a total attorney fees award. *See RECP IV WG Land Inv'rs, LLC v. Capital One Bank (USA), N.A.*, 93 Va. Cir. 282, 329 (Fairfax 2016), *aff'd*, 295 Va. 268 (2018). There are instances of this, and as such, the Court excised those amounts from the ultimate award.

Tenants also complain Landlord unreasonably ran up legal fees. However, the Court finds that this case featured two very well-represented sides exercising their prerogatives. Be it remembered that this seemingly routine landlord-tenant case for unpaid rent and dueling breach of contract actions in the General District Court devolved into three complex Circuit Court cases, with counterclaims, that became one of this Court's most heavily litigated matters for the past two years until a jury, and then this Court, made findings. It spawned parallel proceedings in federal court. Certain issues were effectively litigated multiple times. Before this Court even decided a significant portion of the case and entered a final order, vows of appeal were made. One can charitably call this aggressive lawyering or uncharitably call it a war of attrition. In any event, both sides stood toe to toe, each expecting the other side to ultimately reimburse them their attorney fees when they prevailed. Landlord stood behind the contractual fee-shifting; Tenant behind the tort-based fee-shifting. Each side incurred over $1.3 million in attorney fees. Tellingly, total fees billed to Landlord were approximately 45 percent less than those billed to Tenants. (Gogal Decl. ¶ 13.) The Court cannot say Landlord alone brought the matter to this state of affairs. The Court finds the fees awarded the Landlord herein are reasonable in the face of its skilled opposition.

VII. There is No Material Conflict in the Attorney Fees Provision of the Lease and the Assignment.

Tenants argue there is a distinction with a difference between the attorney fees provision in the Lease and Assignment. The Lease permits recovery of "all expenses and costs of litigation"; the Assignment only permits recovery of "court costs." While textually different, these differences between the documents are not material to the adjudication of *this* issue. In other words, the dispositive factor is not on the text of the document (*what* it says), but on *who* is the contractually bound party. For this purpose, Tenant and Assignee are virtually the same. Ebadom Food, LLC (Tenant) signed the Lease, which it later assigned to Ebadom VA, LLC (Assignee). Therefore, Assignee is obligated under all terms of the Lease—including the Lease's attorney fees provision. The Assignment's provision is only applicable to breaches of that assignment. Here, the Court found there was a breach of the Lease.

Indeed, since the Court found no fraud in the assignment, Ebadom VA, LLC is the entity subject to judgment and is responsible for breaches prior to the assignment. It is subject to the attorney fees provision of the Lease. Stated differently, Ebadom VA, LLC stepped into the shoes of Ebadom Food, LLC and was subject to the terms of the Lease. The attorney fees provision in the Assignment did not negate the attorney fees provision in the Lease. Just as Ebadom Food, LLC agreed to pay attorney fees for Landlord's enforcement actions, so did Ebadom VA, LLC as the assignee of that lease.

The real issue in this case was breach of the Lease, for which the Lease's attorney fees provision apply. It was not breach of the Assignment, for which the Assignment's attorney fees provision applies. For the reasons discussed in Section IV, *supra*, Landlord was enforcing the Lease, as assigned. Thus, its work all fell under "enforce[ment]." (Lease § 2701.)

Tenants are correct to distinguish the enforcement of the Lease from enforcement of the Assignment. However, Landlord needed to defend Tenants' various fraud claims as part of its ability to enforce the Lease. The Court finds Landlord's work to enforce the Lease included work necessary to defend the challenges against the Assignment. All that work was work necessary to enforce its Lease and Ebadom VA, LLC agreed to pay those fees by accepting assignment of the Lease.

VIII. Preparation of Final Order.

Lauren McLaughlin shall please enter an attorney fees award of $1,233,069.58 in the sketch order being prepared, which incorporates the entirety of this Court's rulings and jury verdict in this case. The order shall incorporate by reference this Opinion Letter. Ms. McLaughlin shall then circulate it to Tenants' counsel for endorsement with any objections. This matter remains on the docket for May 8, 2020, at 10:00 a.m. for entry of the final order. But, should counsel submit a fully endorsed order before then, the Court will enter the order in Chambers, relieving counsel of the court appearance.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

OPINION LETTER