SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

November 28, 2011

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RE: C.A. No. S09C-09-013-ESB
Shore Investments, Inc. v. Bhole, Inc., et al.
Letter Opinion

Date Submitted: August 5, 2011

Dear Counsel:

This is my post-trial decision in this case involving a dispute between a landlord and its tenant over the tenant's decision to move its liquor store from the landlord's building to a larger building next door before the tenant's lease expired. The dispute also involves the tenant's president and sole shareholder and the three other parties that worked together to acquire ownership of the tenant and cause it to move its liquor store to the large building they had leased. The landlord/plaintiff is Shore Investments, Inc. Shore's president is T. Theodore Jones. The tenant/co-defendant is Bhole, Inc. Bhole's president and sole shareholder at the start of this dispute was Kiran Patel. The three other parties/co-defendants are Outlet Liquors, LLC, Highway I Limited Partnership and Alexander J. Pires, Jr. Outlet Liquors later acquired Patel's stock in Bhole.

Background

Shore owns a 1.2 acre parcel of land located on Route One near Rehoboth Beach, Delaware. The land has three relatively small commercial buildings on it, ranging in size from 2624 square feet to 4400 square feet to 5000 square feet. Shore leased the 4400 square-foot building to Bhole, which used it for a liquor store trading as "Ocean Wines and Spirits." This building has been continuously used as a liquor store since 1971. Patel ran the liquor store. Shore leases the 2624 square-foot building to a business that sells steak sandwiches. It leases the 5000 square-foot building to an upscale restaurant, a company that sells vacuum cleaners, and a meat market. Highway I Limited Partnership operates restaurants, bars, nightclubs, motels, liquor stores and other businesses in the Dewey and Rehoboth Beach areas. It leases the 20,500 square-foot Salvation Army building that is located approximately two feet away from Bhole's former liquor store. Pires is a class action lawyer, entrepreneur and managing partner of Highway I. Outlet Liquors, LLC is an entity that Pires formed to acquire Bhole's common stock. It later merged with Bhole and now operates a liquor store in the Salvation Army building.

At some point in time Pires decided that he wanted to operate a large liquor store at the beach. He first tried to purchase Atlantic Liquors in Rehoboth Beach. When Pires was unable to purchase that liquor store, he turned his attention to Bhole's liquor store. His plan was to purchase Bhole's assets and expand the liquor store by moving it to the Salvation Army building. Pires hoped to do this by constructing an opening connecting Bhole's leased premises to the Salvation Army building. Pires formed Outlet Wines, LLC to buy Bhole's assets, including its liquor license. He also caused Highway I to enter into a lease for the Salvation Army building.

In order to expand Bhole's liquor store, Pires needed Shore to approve the assignment of Bhole's lease to Outlet Wines. Pires approached Ted Jones in June 2008. They exchanged letters and eventually met in person. Pires' letter enclosed three proposed amendments that he wanted to make to the lease. His amendments would have allowed Bhole to stop using its leased premises for the liquor store and to instead use them for any lawful general retail purpose. They would also have allowed Pires to move the liquor store to the Salvation Army building. Pires and Ted Jones were unable to reach an agreement on the amendments to the lease and the assignment of it. Jones wanted $250,000.00 to complete the deal. Pires refused to pay that and walked away.

When his plan to purchase Bhole's assets did not work out, Pires decided to purchase Patel's common stock in Bhole and transfer its liquor license to the Salvation Army building. Pires had Outlet Wines purchase Patel's common stock in Bhole on November 13, 2008. He filed an application with the Alcoholic Beverage Control Commission to transfer Bhole's liquor license to the Salvation Army building on December 3, 2008. Ted Jones was not happy with Pires' plans. He filed a lawsuit in the Court of Chancery, seeking an injunction prohibiting the transfer of Bhole's liquor license. That effort failed. Ted Jones also appeared at the hearing before the ABCC and opposed Bhole's application to transfer its liquor license. That effort also failed. The ABCC approved Bhole's application to transfer its liquor license on April 7, 2009. Bhole, which was by now a wholly-owned subsidiary of Outlet Wines, merged into Outlet Wines on April 30, 2009. Outlet Wines changed its name to Outlet Liquors on the same date.

Pires continued to operate a liquor store in Bhole's leased premises until the ABCC approved the transfer of Bhole's liquor license to the Salvation Army building. When the

ABCC approved the license transfer, he moved the liquor store into the Salvation Army building and used Bhole's leased premises for storage. Even though Pires had moved the liquor store, he continued to pay rent to Shore.

After Pires moved the liquor store, Ted Jones went in and inspected Bhole's leased premises. He found that the electric and air conditioner had been turned off. Ted Jones also found what he thought was mold on the walls. He hired a biologist to inspect the leased premises. The biologist determined that there was mold growing on the walls. This prompted Ted Jones to have his attorney send a letter to the defendants on September 21, 2009, threatening to enforce Shore's rights under the lease and applicable law if the defendants did not return the liquor store to Bhole's leased premises and clean up the mold. Instead of correcting the alleged breaches, Pires returned the keys for Bhole's leased premises to Ted Jones near the end of September 2009, reasoning that he would ultimately lose an action for possession of the leased premises. He also stopped paying rent. Ted Jones had a contractor clean up the mold and demolish a part of the interior of the leased premises. He tried to find another tenant, but was not able to do so.

The Lawsuit and Trial

Shore filed a lawsuit against the defendants on September 10, 2009. The lawsuit alleges that (1) Bhole breached its lease with Shore, (2) the defendants conspired to tortiously interfere with Shore's lease with Bhole, and (3) the defendants conspired to tortiously interfere with Shore's business expectations. Shore seeks unpaid rent for the balance of the lease term and compensation for the cost of cleaning up the mold, demolishing the interior of the building, removing debris from the building, installing a new heating, ventilation and air-conditioning system in the building, and remodeling the building.

Shore also seeks compensation for losses caused by it no longer having a liquor store as a tenant. Shore's total compensatory damages are claimed to be $1,146,614.63. Shore also seeks punitive damages and its attorneys' fees.

A bench trial was held on March 7, 2011. Ten witnesses testified at the trial. Ted Jones, Jeffrey T. Jones, Eric W. Jones, Robert Pepe, Patricia McDaniel, Susan E. White, and David J. Wilk testified for Shore. Pires, J. Frank Peter and Matthew J. Haley testified for the defendants. Patel did not defend himself or testify. Shore obtained a default judgment against him. Shore and the defendants submitted post-trial briefs.

Ted Jones testified about Shore's rental properties, the terms of the lease between Shore and Bhole, Pires' efforts to obtain amendments to and an assignment of the lease, Bhole's abandonment of the leased premises, damages to the leased premises, and his efforts to find another tenant for the leased premises.

Robert Pepe is a sales manager for the George Sherman Corporation, a company that does plumbing, heating and air-conditioning work. He testified about the cost of replacing the heating, ventilation and air-conditioning systems in the leased premises. Pepe testified that this would cost $57,094.52.

Patricia McDaniel is the president of Boardwalk Builders. She testified about the cost of converting the leased premises into a plain vanilla shell. McDaniel testified that this would cost $64,470.00, excluding the HVAC work.

Susan E. White is a certified microbial consultant with Sussex Environmental Health Consultants. She testified that she found mold in the leased premises and that it was caused by the failure to properly control the humidity.

Jeffrey T. Jones is a building contractor. He is also one of Ted Jones' sons. Jeff

Jones testified about cleaning up the mold and demolishing part of the interior of the leased premises. He charged $7,600.00 for cleaning up the mold and $10,355.00 for the demolition work.

David J. Wilk is a real estate appraiser with Greystore Realty Advisors. He testified that Shore's damages were in excess of $200,000.00 for the balance of the lease term.

Eric W. Jones is the owner of GT Capital, Inc., a proprietary trading firm that he owns. He is also one of Ted Jones' sons. He testified that Shore would suffer damages of $880,000.00 for the 20-year period of time following the end of the lease term because it would no longer have a liquor store as a tenant.

Pires testified about his negotiations with Ted Jones to amend Bhole's lease and obtain an assignment of it and the steps that he took to open a large liquor store in the Salvation Army building.

Matthew J. Haley is a restauranteur. He owns and operates a number of restaurants along the Delaware beach. Haley testified about his negotiations with Ted Jones to lease Bhole's former premises for a new restaurant.

J. Frank Peter is a consultant for Cogent Building Diagnostics. He testified that the mold was caused by water leaking into the leased premises.

The Claims

1. Shore's Breach of Lease Claims

Shore argues that Bhole breached the lease by not (1) continuously operating a liquor store in the leased premises, and (2) cleaning up the mold before surrendering

possession of the leased premises in September 2009.[1] Shore and Bhole entered into a lease on August 31, 2004. The lease was for a seven-year term, starting on September 1, 2004, and ending on August 31, 2011. There was, at Bhole's election, an option for one additional seven-year term. Rent was $33,000 per year for the first four years of the lease and $61,600 per year for the last three years. Bhole was also responsible for its proportionate share of the hazzard insurance expense, real estate taxes, common lighting costs, common area maintenance expenses, and sewer charges. The lease also had provisions regarding Bhole's obligation to use the leased premises for the operation of a liquor store and a provision regarding Bhole's obligation to maintain the leased premises in good condition. Bhole stopped operating a liquor store in the leased premises in April 2009. It turned over the keys to the leased premises to Shore in September 2009. Bhole did not pay any rent thereafter and it did not clean up the mold. A breach of lease occurs when a tenant does something prohibited by the lease or fails to do something required by

[1] Shore also alleged that Bhole breached the lease when Outlet Wines purchased Patel's common stock in Bhole. This allegation was addressed briefly in Shore's post-trial brief. I have concluded that there was no breach because the lease remained with Bhole and no one else. Therefore, there was, as a matter of fact, no assignment of it.

Shore previously filed an action in the Court of Chancery against Bhole, Pires, Outlet Wines and Highway I, seeking an injunction to (1) stop Bhole from transferring the liquor license to the Salvation Army building, and (2) force Bhole to operate a liquor store in the leased premises. The Court of Chancery granted the defendants' motion to dismiss, reasoning that it had no jurisdiction over these matters because Bhole's application to transfer its liquor license was properly before the ABCC and that Bhole's remedy for its breach of lease claim regarding the operation of the liquor store was an award of monetary damages, which could be awarded by the Superior Court. As such, the Chancery Court did not address the merits of Shore's breach of lease claims. (*Shore Inv., v. Bhole, Inc.*, 2009 WL 2217744 (Del. Ch. July 14, 2009).

the lease.[2]

A. Continuous Operation of the Liquor Store

Shore argues that the lease required Bhole to continuously operate a liquor store in the leased premises. This argument is based on paragraphs 10 and 11 of the lease, which state as follows:

> **10. Use of Premises** - Tenant shall use the premises for the purpose of conducting the business of retail sales of alcoholic beverages including beer, wine and spirits, and all other retail sales of merchandise allowed by the Delaware Alcoholic Beverage Control Commissioner.
>
> **11. Operation of Business** - Tenant shall conduct its business on the premises at least during the regular and customary days, nights and hours for such type of business, as regulated by the Delaware Alcoholic Beverage Control Commissioner.

Bhole argues that it did not breach the lease because (1) paragraphs 10 and 11 merely authorized it to operate a liquor store in the leased premises, but did not require it to do so, (2) the breaches were not material and were excused by the fact that it kept paying rent, and (3) the ABCC approved the transfer of the liquor license from the leased premises to the Salvation Army building, thus prohibiting it from using the leased premises as a liquor store. I have concluded that Shore's interpretation of paragraphs 10 and 11 is correct and that there is no merit to any of Bhole's arguments.

In deciding what the language of paragraphs 10 and 11 means I am governed by

[2] A lease is a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually rent." Black's Law Dictionary 970 (9th ed. 2009). A breach of contract is a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." Black's Law Dictionary 213 (9th ed. 2009).

well-established rules of contract interpretation. These rules have been stated as follows:

> When interpreting a contract, the role of the court is to effectuate the parties' intent. In doing so, we are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended. In *Rhone-Poulenc [Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992)], this Court explained the paramount importance of determining what a reasonable person in position of the parties would have thought the language of a contract means. Clear and unambiguous language . . . should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented. . .
>
> Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.[3]

I have concluded that paragraphs 10 and 11 are clear and unambiguous. Both use "shall," which is generally interpreted to be mandatory.[4] The two paragraphs, when taken together, clearly required Bhole to operate a liquor store in the leased premises during the regular and customary days, nights and hours for this type of business as set by the ABCC.

Pires also understood exactly what these paragraphs meant. His understanding of them can be gleaned from an examination of his plans for a large liquor store and the nature of the amendments that he proposed to make to these paragraphs in order to carry

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[3] *Lorillard Tobacco Company v. American Legacy Foundation,* 903 A.2d 728, 739 (Del. 2006).

[4] *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991).

out his plans. Pires wanted to operate a liquor store in the Salvation Army building. In order to do this he needed Bhole's leased premises, but not for very long, which is why he wanted to amend Bhole's lease. Pires proposed to delete the original paragraph 10 and replace it with the following language:

> Tenant shall be authorized to use Premises for any lawful general retail purpose permitted under the zoning code for Sussex County, Delaware including, but not limited to, the retail sales of alcoholic beverages.

Pires proposed to delete the original paragraph 11 and replace it with the following language:

> Tenant shall conduct its business on the premises at least during the regular and customary days, nights and hours for such type of business.

Pires proposed to add a new paragraph 44, which states as follows:

> Subject to obtaining all required governmental approvals and permits, Tenant shall be authorized to create an opening between the Premises and the existing building located to the west of the Premises and may seek approval from the DABCC to move or expand the licensed premises of the retail liquor sales facility to the adjacent building.

Pires' proposed amendments would have allowed him to immediately stop operating a liquor store in the leased premises, move the liquor store to the Salvation Army building, and use the leased premises for any lawful general retail purpose of his choosing. Obviously, Bhole's obligation to operate a liquor store in the leased premises was an obstacle to his plans to operate a liquor store solely in the Salvation Army building. Pires tried to eliminate that obstacle by amending paragraphs 10 and 11 and adding a new paragraph 44. When he did not succeed in amending Bhole's lease, he decided to ignore its provisions by moving the liquor store to the Salvation Army's building and just use the leased premises for storage. That was clearly a breach of the lease.

Moreover, that breach was material and is not excused by the fact that Bhole kept paying rent. "Material breach" has been explained as follows:

> "It has been said that a "material breach" is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must "go to the root" or "essence" of the agreement between the parties, or be "one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." A breach is "material" if a party fails to perform a substantial part of the contract . . . . "[5]

> "Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, 'it is necessary that the failure of performance on the part of the other go to the substance of the contract.' [M]odern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary . . . . Thus, although a material breach excuses performance of a contract, a nonmaterial-or *de minimis*-breach will not allow the non-breaching party to avoid its obligations under the contract."[6]

Shore and the defendants appreciated the importance of these paragraphs, albeit for different reasons. Shore viewed them as furthering its interests by guaranteeing that it would have a liquor store as a tenant. Pires viewed them as an obstacle to his plans for a liquor store in the Salvation Army building.

Shore wanted to have a liquor store on its property for a number of reasons. One, the leased premises are ideally suited for the operation of a liquor store. The 4400 square foot building was built to be a liquor store and has been used as one since 1971. It has large coolers for the beer and shelving to display the liquor and wine. As such, it was not easily turned into something else. Two, Shore believed that a liquor store was able to pay

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[5] 23 Williston on Contracts § 63:3 (4th ed.).

[6] *DeMarie v. Neff,* 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

a higher rent than other types of stores because liquor stores have something of a geographic monopoly. Paragraphs 10 and 11 were certainly core requirements of the lease for Shore.

The importance of these paragraphs to Jones is further evidenced by his reaction to Pires' proposed amendments to paragraphs 10 and 11 of the lease and the new paragraph 44. Jones understood that these amendments would allow Pires to move the liquor store to the Salvation Army building. Even though Pires would still have to operate some type of business in the leased premises, Jones was unwilling to give up the liquor store unless Pires paid him $250,000.00. There is nothing immaterial about this amount of money.

Moreover, no landlord wants a tenant's store to go "dark." Shore has three buildings on its property that it leases to a variety of businesses. The liquor store was in the second largest building. To have a store of this size go "dark" in a small shopping center was certainly undesirable to Shore, as it would be to any landlord.

Pires also fully understood the importance of paragraphs 10 and 11 to Shore. As I have already noted, he knew that Jones wanted $250,000.00 to amend them. Pires also understood that they stood in the way of his plan to move the liquor store to the Salvation Army building. I find it ironic that the paragraphs of the lease that the defendants now argue are immaterial are exactly the same ones that they wanted to modify because they stood squarely in the way of their plans. If they were immaterial, then why bother to try to amend them. The answer is that they were material because they were an obstacle to Pires' plans.

Finally, the compliance with one provision of the lease, such as paying rent, does

not excuse non-compliance with the other provisions. No tenant gets to pick which provisions of a lease that it will abide by and which ones it will ignore. The fact that Bhole kept paying the rent for some time does not excuse its breach of its other obligations under the lease. These are obligations that must be met. The lease itself defined the obligations set forth in it as "interdependent on one another" and that the failure to faithfully observe them was as an event of default.[7]

The ABCC's action does not excuse Bhole's breach of its lease either. The ABCC merely approved the transfer of the liquor license from the leased premises to the Salvation Army building. It did not have the authority to re-write the lease between Shore and Bhole. Moreover, Bhole's argument fails to recognize that it was Bhole who requested to transfer its liquor license, not the ABCC. The lease also dealt with governmental action in a very specific and limited way. This is set fourth in paragraph 28, which states:

> In the event that any law, regulation, or ordinance of any governmental authority now in effect or hereafter enacted or adopted shall prohibit or restrict the uses of the Premises for the purposes stated hereinabove, then, at Tenant's option, this Lease shall terminate and the rent due hereunder, if any, for such period as Tenant shall have occupied the Premises shall be adjusted to the date and such termination by Tenant.

The ABCC did not rule that Bhole's leased premises could not be used for a liquor

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[7] 25. Default - The prompt payment of the rent for said Premises upon the dates named and the faithful observation of the terms of this Lease are the conditions upon which this Lease is made and accepted and upon any failure on the part of the Tenant to pay the rent due hereunder or any failure to comply with the terms of this Lease which shall continue for a period of ten (10) days following notice of such default by Landlord to Tenant, the Landlord, his agents or attorneys, shall have the right to enter said Premises and remove all persons therefrom by legal proceedings to recover possession of said Promises.(**Emphasis added**).

30. Interdependence of Provisions - All covenants, responsibilities, obligations and promises contained herein are mutually dependent, i.e. interdependent on one another.

store. If it had done so, then Bhole could have terminated its lease and moved the liquor store to the Salvation Army building without any consequences. That is not what happened in this case.

B. Mold

Shore argues that Bhole also breached the lease by allowing mold to grow on the walls in the leased premises and not cleaning it up. Shore and the defendants had the leased premises inspected by experts. There is no dispute that there was mold growing on the walls. The presence of moisture and high humidity led to the growth of mold. The dispute is over what caused it to grow and who is responsible for cleaning it up. Shore argues that Bhole failed to run the air conditioning system in the leased premises after it moved the liquor store to the Salvation Army building, resulting in the growth of the mold. Bhole argues that the mold was caused by water leaking into the leased premises from the roof and walls.

Shore's argument is based on paragraphs 10, 11 and 16 of the lease. Paragraphs 10 and 11 obligated Bhole to continuously operate a liquor store in the leased premises. Paragraph 16(a) states, in applicable part:

> The Tenant shall, during the term of this Lease and any renewal or extension thereof, at its sole expense, keep the interior of the premises in as good order and repair as it is at the date of commencement of this lease.

Shore combines Bhole's obligations under these three paragraphs and argues that if Bhole had kept the liquor store in the leased premises and operated the air conditioning system at the appropriate level during the hot and humid summer, then the mold would not have grown on the walls. Paragraph 16(a) standing alone would have required Bhole to clean up the mold once it appeared. Thus, according to Shore, Bhole could have dealt

with the mold either by preventing it from growing in the first place or cleaning it up once it appeared.

Bhole argues that the mold was caused by water leaking into the leased premises through the roof and walls and that it was not responsible for this. Its argument is based on paragraph 16(b) of the lease, the applicable part of which states:

> The Landlord shall keep the foundations, structural supports, and exterior walls and roof of the building housing the Premises in good order and repair.

Shore was initially responsible for keeping the exterior walls and roof of the building in good order and repair. The evidence indicates that Shore did not do this. There were stains on the inside of the walls and ceiling tiles, indicating that water had come in through the roof and walls at some time. The roof was fairly old. The walls were made of concrete block and were over 40-years-old and had not been painted in a long time.

However, the evidence indicates that Bhole only once complained of water leaking through the roof in 2008 and that Shore fixed the problem. Thus, it is unclear when the water leaked into the leased premises and if it had done so during the summer of 2009. Moreover, this issue is complicated by the fact that the defendants had assumed responsibility for maintaining the leased premises even though they were not required to do so by the lease. Pires testified that he leases many buildings and that, regardless of the terms of the leases, he maintains the buildings just as if he owned them. This would explain why Bhole never complained to Shore in the summer of 2009 about water leaking into the leased premises if, in fact, that was happening at the time. Shore also could not, as a practical matter, do anything about water leaking into the leased premises until Bhole made it aware of the problem. Bhole was in possession of the leased premises and in the

best position to know if there was a problem. There is no evidence establishing that Bhole complained to Shore about water leaking into the leased premises during the summer of 2009. If it was aware of water leaks, but did not notify Shore of them, or handled them itself, then Bhole has no reason to complain.

Given that the defendants assumed responsibility for maintaining the roof and walls and never complained to Shore about water leaking into the leased premises, I have concluded that Bhole is responsible for the mold. Quite simply, Bhole was responsible for the conditions that allowed the mold to grow. It did not keep the water from leaking into the leased premises. It did not notify Shore about water leaking into the leased premises. It did not run the air conditioning system enough to keep the humidity low enough to prevent the mold from growing. It did not clean up the mold. I also note that there was no evidence of complaints by Bhole of mold in the leased premises before it shut down the air-conditioning system. Therefore, I conclude that Bhole breached the lease by not cleaning up the mold.

Mitigation of Damages

Shore had the obligation under the applicable law and paragraph 35 of the lease to mitigate its damages.[8] I have concluded that it did make a reasonable effort to do so. Ted Jones did talk to several prospective tenants. He spoke with Haley, who runs a number

[8] Minimization of Damage - Under this Lease, both Landlord and Tenant shall faithfully attempt to avoid and minimize damages resulting from the conduct of the other party. [Furthermore, in Delaware "[a] party has a general duty to mitigate damages if it is feasible to do so." *Norkei Ventures, LLC v. Butler-Gordon, Inc.*, 2008 WL 4152775, at *2 (Del. Super. Aug. 28, 2008). "As a general rule, a party cannot recover damages for loss that he could have voided by reasonable efforts." *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *4 (Del. Ch. Feb. 23, 2009). Accordingly, "the injured party has a duty to minimize . . . its costs and losses." *Id.*].

of restaurants at the beach, and the other owners of Nage Restaurant, a current tenant of Shore. In both instances nothing worked out and the evidence suggests that this was through no fault of Shore. Neither prospective tenant got very far in the negotiations, raising some doubts in my mind as to how serious they were. Moreover, both prospective tenants would have wanted Shore to share a substantial portion of the cost of turning the former liquor store into a restaurant, an obligation that could have cost Shore hundreds of thousands of dollars. I find no fault in Shore's actions in this regard. When Ted Jones was unable to find a tenant himself, he retained a commercial real estate company to find a tenant. It had no more luck than Ted Jones, which is not surprising given, as Ted Jones noted at trial, the poor real estate market.

The Breach of Lease Damages

Shore seeks unpaid rent for the balance of the lease term and compensation for the cost of cleaning up the mold, demolishing the interior of the building, removing debris from the building, installing a new heating, ventilation and air-conditioning system in the building, and remodeling the building.

A. Rent

Shore seeks rent in the amount of $127,095.21 from Bhole for the period of time from the day that Bhole turned over the keys for the leased premises until the end of the initial seven-year term of the lease. This covers the period of time from September 2009 to the end of August 2011.

Bhole kept paying the monthly rent after it moved the liquor store from the leased premises to the Salvation Army building. It was using the leased premises for storage. When Shore threatened to evict Bhole if it did not return the liquor store to the leased

premises and clean up the mold, Bhole turned the keys over to Shore and stopped paying rent.

The issue is what legal effect is to be given to Bhole's turnover of the keys and Shore's efforts to find another tenant for the leased premises. Shore and Bhole did not reach an agreement on what it meant. Bhole argues that its obligation to pay rent ended when Shore accepted the keys and took possession of the leased premises. Shore argues that Bhole left it with no choice but to take the leased premises back, clean up the mold and try to mitigate its losses by finding another tenant.

The law in Delaware is that when a tenant surrenders the leased premises prior to the expiration of the lease term and the landlord "accepts" the leased premises without reservation, then the landlord may not recover rent from the tenant for the balance of the lease term. However, what constitutes "acceptance" is not always clear, as evidenced by the Court's statements in *Conner v. Jordin*,[9] one of the few cases in Delaware to address the issue:

> A mere surrender of the premises by lessee is not sufficient, but there must also be an acceptance by the lessor. The fact that the landlord received the keys is evidence of a surrender, but generally speaking, that of itself does not amount to an acceptance. There are many reasons for which the landlord might require the keys after the premises had been abandoned by the tenant. The most usual of which are caring for the property, making necessary repairs and showing it to prospective renters. Acts of this nature are not considered an acceptance.[10]

The Court went on to add the following:

> When, however, the landlord takes absolute possession of the

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[9] 181 A. 229 (Del. Super. 1935).

[10] *Id.* at 231.

> property without any qualification, such an act constitutes an acceptance; unless he expresses an intention to hold the tenant for rent, or unless there was some provision in the lease authorizing him to re-enter if the property became vacant.[11]

The Court ultimately found in *Conner* that the tenant who had abandoned the premises and gave the keys back to the landlord was responsible for the rent even though the landlord took the keys and tried to find another tenant for the premises.

I conclude that Shore is in the same position that the landlord was in *Conner.* Shore did nothing more than make the best of a situation that was not of its own making. Thus, this is a case of mitigation, not acceptance. Shore had met all of its obligations under the lease. Bhole had not and Pires knew it, which is why he simply turned the keys over to Shore and stopped paying rent. When Bhole walked away from the leased premises and stopped paying rent, Shore was left with no choice but to take the leased premises back and try to find another tenant. Indeed, as I noted earlier, paragraph 35 of the lease required Shore to "avoid and minimize damages resulting from the conduct" of Bhole. It had no choice but to take the leased premises back and mitigate its losses by cleaning up the leased premises and trying to find another tenant. When you are left with no choice, doing the only thing that you can do is hardly an act of "acceptance," particularly when you are required to do so by the terms of your lease.

The measure of damages that Shore is entitled to recover is the difference between the rent it was entitled to recover under the lease less the fair market value of a replacement lease.[12] Since Shore was unable to find another tenant for the leased

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[11] *Id.*

[12] *Curran v. Smith-Zillinger Co.*, 157 A. 432 (Del. Ch. 1931).

premises, the amount owed is the amount due for the balance of the lease term, which is $127,095.21.

B. Building Renovations

Shore seeks $64,470 so that it can turn the leased premises into a vanilla shell in order to rent it out to another tenant. The leased premises are set up for the operation of a liquor store. It can not be a liquor store anymore because there is now one next door and the ABCC regulations prohibit liquor stores from being this close together. Thus, Shore argues that it had to turn the leased premises into a vanilla shell so that they can be rented as part of its mitigation of damages.[13]

Shore obtained an estimate from Boardwalk Builders to renovate the leased premises. The work is fairly exhaustive and includes both demolition and construction. The demolition included removal of the walk-in coolers that were used to store and chill the alcoholic beverages, removal of the floor tile, and removal of the damaged portions of the ceiling grids. The new construction included building walls to create a utility room for the electrical panels, adding a suspended ceiling and insulation, performance of electrical work for various lights, the installation of new drywall and trim and painting the interior of the leased premises.

Shore argues that it had to incur these expenses in order to mitigate its damages by getting the leased premises ready to rent out to another tenant. Shore's argument is based on contract law where "the measure of damages has always been tempered by the rule requiring the injured party to minimize his loses, although the party causing the breach

[13] *Norkei Ventures, LLC*, 2008 WL 4152775, at *2.

would pay for the cost of minimizing the injury."[14] The problem is that Shore never spent this money to mitigate its losses. The loss that Shore was trying to mitigate was the lost rent for the balance of the lease term. The lease term has now expired and Shore has still been unable to find another tenant. Thus, Shore's lost rent claim is fixed at $127,095.21. To compensate Shore now for remodeling its building when spending the money will not mitigate its losses is not appropriate, particularly since my award to Shore of rent for the balance of the lease term will fully compensate it for the loss it was trying to mitigate. Therefore, I award no remodeling costs to Shore.

C. Demolition

Shore seeks $7,600.00 for the cost of certain demolition work that it had done to the leased premises after Bhole left in order to get the leased premises ready to be remodeled. Shore had a contractor remove the office walls, cashier's elevated platform, carpeting, shelving, paneling, ceiling tiles, insulation, ceiling grid frames, wall at the rear of the retail area, and all debris. The contractor left the building broom clean. This work cost $7,600.00. Pires testified that Bhole had moved all of its property out of the leased premises before it left.

Shore's claim implicates both the lease and its duty to mitigate damages. The applicable lease provision is set for in paragraph 23 of the lease, which states as follows:

> All additions, fixtures, or improvements which may be made by Tenant and attached to the realty, other than trade fixtures, shall become the property of the Landlord and remain upon the Premises as part thereof, and be surrendered with the Premises at the termination of this Lease. All trade fixtures, including, but not limited to, signs, cabinetry, counters, computer desks and stands and smoke or heat distillation devices, shall remain the

[14] *Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866 (Del. Super. 1971).

> property of the Tenant and Tenant shall have the right to remove said fixtures at any time provided no damage is done to the premises in the removal process and the premises are returned to the Landlord in the same condition as when the premises were demised normal wear and tear excepted.(**Emphasis added**).

Bhole had the right to remove its trade fixtures from and the obligation to return the leased premises to Shore "in the same condition as when the premises were demised normal wear and tear excepted." The leased premises have been used as a liquor store since 1971. Ted Jones, the president of Shore, operated it himself as a liquor store for many years. Virtually everything that Shore demolished and removed was used for the operation of the liquor store and, given the absence of evidence to the contrary, was most likely in the leased premises when Bhole entered into its lease in 2004. Given the description of what was removed by Shore's contractor, it appears that Bhole did remove its trade fixtures. Therefore, it is unclear to me as to whether Bhole had an obligation to remove everything from the leased premises that Shore removed. There was no evidence regarding the condition of the leased premises when Bhole took over and no evidence regarding the condition of the leased premises when Shore got them back. Thus, I have concluded that Bhole is not responsible for these demolition costs under the lease. I have also declined to award these costs as part of Shore's effort to mitigate its damages because the demolition costs were incurred to prepare the building for remodeling, which I have concluded were not compensable. Therefore, I award no demolition damages to Shore.

D. HVAC

Shore seeks $57,094.52 to pay for the cost of installing a new heating, ventilation and air-conditioning system in the leased premises. This would include two new oil fired

furnaces and two new air-conditioning units and the related duct work and control systems. This claim is governed by paragraph 16(b) of the lease, which provides, in applicable part, that:

> The Tenant shall maintain in good working order and repair all interior plumbing, toilet facilities, and other fixtures and equipment installed for the general supply of water, heat, air-conditioning, and electricity. It is warranted by the Landlord that the Walk-in-boxes (Beer coolers) plumbing, heating and air conditioning relevant to the subject Premises are in good, operating condition at the time of the commencement date of this lease.

The lease between Shore and Bhole was entered into on August 31, 2004. The HVAC system was quite old at the time. Robert Pepe, the person who prepared the estimate for the new HVAC system, testified that one of the oil furnaces was 20-years-old and had lived out its useful life and that the air-conditioner on the roof was over 20-years-old and obsolete. He also testified that much of the duct work was obsolete. Obviously, the HVAC did not get old and obsolete in the seven years that Bhole was responsible for it.

Moreover, Bhole's obligation was to keep the HVAC system in good working order, not replace it when it had outlived its useful life. There was no evidence that the HVAC system was not in good working order. Indeed, it seems that it was working properly since Bhole operated a liquor store in the leased premises until April 2009. Bhole only turned off the HVAC because it moved the liquor store next door and had no need to run the HVAC when it was only using the leased premises for storage. I conclude that Shore has failed to prove that the HVAC system was not in good working order.

E. Mold Clean-up

Shore seeks $7,900.00 to pay for the cost of cleaning up the mold. I have already

determined that Bhole breached the lease by allowing mold to grow in the leased premises and not cleaning it up. The cost to inspect for mold was $300.00. The cost to clean up the mold was $7,600.00. Therefore, Shore is entitled to recover $7,900.00 from Bhole.

F. Attorneys' Fees and Costs

Shore seeks recovery of its attorneys' fees. This is governed by paragraph 19 of the lease, which states that:

> Tenant and Landlord agree to pay to the prevailing party all reasonable costs, attorney's fees, and expenses which shall be made and incurred by the Tenant or Landlord as the case may be in enforcing the respective covenants and agreements of this lease.

Since Shore has prevailed on its breach of lease claims, it will be entitled to recover its attorneys' fees and costs from Bhole.

2. Shore's Claim for Tortious Interference With its Lease

Shore argues that the defendants conspired to tortiously interfere with its lease with Bhole by causing Bhole to move its liquor store from the leased premises to the Salvation Army building. The elements of tortious interference with a contract under Delaware law require the proponent to establish: (1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.[15] The defendants argue that their actions were justified because they were merely competing with Shore by moving the liquor store into a bigger building and everything they did was approved by the ABCC.

Shore has proven each of these elements. One, there was a lease between Shore and Bhole. Two, the defendants knew about the lease. Indeed, Pires had approached

[15] *Irwin & Leighton, Inc. v. W.M. Anderson Company,* 532 A.2d 983 (Del. Ch. 1987).

Jones about renegotiating the terms of the lease and obtaining an assignment of it. Three, the defendants did cause a breach of the lease. They did this by obtaining ownership and control of Bhole and then causing it to breach the lease by moving the liquor store from the leased premises to the Salvation Army building, thus violating the continuous operation provisions of the lease. Four, the defendants were certainly not justified in breaching the lease. As I have previously concluded, the ABCC's approval of the transfer of Bhole's liquor license was not approval for Bhole to breach the lease. The defendants' fair competition argument is similarly unpersuasive. Shore and the defendants were not in competition with each other in the marketplace. Shore is in the business of leasing out its buildings to tenants who largely operate retail businesses. The defendants are, as far as this case is concerned, in the business of operating a large liquor store. These are distinct and different businesses. Five, Shore was damaged by the defendants' actions.

Shore seeks damages of $200,000 for this claim. Its claim is based on an analysis performed by David Wilk, a real estate appraiser. His written analysis of Shore's damages states that Shore "is entitled to the three plus years of rent that was due under the executed lease which is equivalent to approximately $200,000.00 before any repair costs, environmental issues and costs, legal fees or other damages." He testified that Shore's damages are in excess of $200,000 for the balance of the lease term because Shore can not lease the leased premises for use as a liquor store. He testified further that Shore would have to remodel the leased premises in order to lease them out, but he did not include the cost of this in his written analysis or testimony. In any event, Wilk's report and testimony do not demonstrate how he came up with damages of $200,000.00. The rent for the balance of the lease term is only $127,095.21, leaving a large portion of Wilk's

damage claim unexplained. Thus, I have rejected his testimony as unfounded. However, Shore did adequately establish its damages under its breach of lease claim, which is also an adequate measure of damages for this claim. Therefore, the total damages that the defendants are responsible for is the unpaid rent in the amount of $127,095.21 and mold clean-up costs of $7,900.00.

Punitive Damages

Shore seeks punitive damages to compensate it for the defendants' conspiracy to tortiously interfere with its lease with Bhole. The object and purpose of an award of compensatory damages in a civil case is to impose satisfaction for an injury done.[16] In tort actions that satisfaction normally takes the form of an award of monetary damages to an injured plaintiff, with the size of the award directly related to the harm caused by the defendant.[17] Punitive damages are fundamentally different from compensatory damages both in purpose and formulation.[18] Compensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies.[19] Though the injured plaintiff may receive the punitive damage award, to the extent the plaintiff has already been fully compensated by actual damages, an award of punitive damages is, in a real sense, gratuitous.[20] An award of punitive damages must therefore subsist on

[16] 22 Am.Jur.2d *Damages* § 1, at 13 (1965).

[17] *Jardel Co., Inc., v. Hughes*, 523 A.2d 518, 528 (Del. 1987).

[18] *Id.*

[19] *Id.*

[20] *Id.* citing *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972).

grounds other than making the plaintiff "whole."[21] The punishment element of punitive damages has long been recognized.[22] The imposition of punitive damages has been sanctioned only in situations where the defendant's conduct, though unintentional, has been particularly reprehensible, *i.e.* reckless, or motivated by malice or fraud.[23] A majority of jurisdictions now accept that punitive damages serve a dual purpose - to punish wrongdoers and deter others from similar conduct.[24] This dual purpose is reflected in § 908 of the Restatement (Second) of Torts (1979), which provides in part: "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect. "In actions arising *ex contractu*, punitive damages may be assessed if the breach of conduct is characterized by willfulness or malice."[25] "[W]here the defendant's actions are similar in nature to that of a tort,"[26] or it appears that the defendant has committed a "willful wrong, in the nature of deceit," the Court will award punitive damages under a contract.[27]

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[21] *Jardel Co., Inc.*, 523 A.2d at 528.

[22] *Id.*

[23] *Id.* at 529.

[24] Minzer, Nates, Kimball & Axelrod, *Damages in Tort Actions*, § 40.12 (1982).

[25] *Littleton v. Young*, 1992 WL 21125, at *2 (Del. Jan. 2, 1992).

[26] *Smith v. New Castle County Vocational-Technical School District*, 574 F.Supp. 813, 826 (D.Del. 1983).

[27] *Standard Distributing Co., v. NKS Distributors, Inc.*, 1996 WL 944898, at *6 (Del. Super. Jan. 3, 1996).

I have concluded that punitive damages should be assessed against the defendants for their conduct in this case. The defendants had a plan to open a large liquor store in the Salvation Army building. Shore's lease with Bhole prevented them from doing that until the expiration of the lease on August 31, 2011. Unwilling to wait until then and knowing full well how important it was to Shore to have an operating liquor store on its premises, the defendants intentionally and willfully caused Bhole to breach its lease by moving the liquor store from the leased premises to the Salvation Army building. The compensatory damages that I have awarded to Shore only compensate it for the monies that Bhole was obligated to pay Shore under the lease. That is not an adequate sanction for the defendants' conduct in this case. Therefore, I have assessed them with $25,000.00 in punitive damages.

3. Shore's Claim for Tortious Interference with its Business Expectations

Shore argues that the defendants conspired to tortiously interfere with its business expectation that Bhole would exercise its option to extend the lease for an additional seven-year term and operate a liquor store at the leased premises until August 31, 2018.[28] The elements of a claim for tortious interference with a prospective business relation are: (1) the existence of a reasonable probability of a business expectancy; (2) the interferer's knowledge of the expectancy; (3) intentional interference that induces or causes termination of the business expectancy; and (4) damages.[29] Shore argues that it had a

[28] Shore also argued that this claim covered the period of time ending on the expiration of the initial seven-year lease term. I conclude that this overlaps with Shore's claim for tortious interference with its lease. As such, it is duplicative in that regard.

[29] *American Homepatient, Inc. v. Collier,* 2006 WL 1134170 (Del. Ch. April 19, 2006), citing *All Pro Maids v. Layton*, 2004 WL 1813276, at *5 (Del. Ch. Aug. 9, 2004).

reasonable expectation that Bhole would exercise its option to renew the lease for another seven years and continue to operate a liquor store at the leased premises. I have concluded that there was no such reasonable expectation.

It is uncertain if Patel would have exercised Bhole's option to extend the lease term if the defendants had not purchased his stock. Once the defendants did, it became clear that they would not exercise the option. The issue is whether the defendants' actions were wrongful. I have concluded that they were not in this instance.

Patel did not testify at the trial. Thus, it is not clear what he intended to do upon the expiration of the initial lease term on August 31, 2011. Shore's argument that Patel would have exercised Bhole's option to extend the lease is based on its belief that the liquor store business is very profitable and that Patel would have likely stayed with it. However, the marketplace is changing for small liquor stores like Bhole's. Pires testified that small liquor stores are giving way to large liquor stores like Atlantic Liquors. This trend and the adverse effect of it on Bhole are reflected in its declining sales and income. Bhole had sales of $1,224,418.00 and income of $45,725.00 for 2006. It had sales of $1,019,821.00 and income of $4,714.00 for 2007. There was a decline in sales of $204,597.00 and income of $41,011.00 in just one year. It looks like Patel also saw the marketplace changing for the worse and decided to leave the liquor store business, at least at this location.

Patel had the right to sell his common stock in Bhole and the defendants had the right to purchase it. They completed this transaction on November 13, 2008. Once Bhole filed an application with the ABCC to transfer its liquor license from the leased premises to the Salvation Army building, Shore certainly had to know that the option would not be exercised because the defendants no longer needed Bhole's leased premises. Any

uncertainty on Shore's part was removed once the ABCC approved the license transfer on April 7, 2009. Thus, Shore knew a full 16 months before the expiration of the lease term that the option would not be exercised.

The defendants did not violate Shore's lease or its reasonable business expectations by purchasing Patel's stock and transferring the liquor license to the Salvation Army building. However, they did cause Bhole to breach its lease with Shore by moving the liquor store to the Salvation Army building before the lease expired on August 31, 2011. If Bhole had continued to operate a liquor store in the leased premises and otherwise complied with the lease until August 31, 2011, then Shore would not have any claims against the defendants. Since the only thing that the defendants did wrong was to breach the lease, I have concluded that there was no tortious interference by them with Shore's reasonable business expectations regarding the option. Stated another way, the defendants' actions are adequately covered by Shore's two other claims.

Conclusion

Shore Investments, Inc. has prevailed on two of its three claims against the defendants. Its total compensatory and punitive damages are $159,995.21. I will summarize the damages for these claims and identify the defendants who are responsible for them.

On Shore's breach of lease claim, I award Shore compensatory damages of $134,995.21, consisting of rent for the balance of the lease term of $127,095.21 and mold clean-up costs of $7,900.00. I also award Shore its attorneys' fees, the costs of this action

and pre- and post-judgment interest at the applicable rate.[30] The responsible defendants are Bhole, Inc. and Outlet Wines, LLC, which became responsible for Bhole's obligations by merging with it.[31]

On Shore's tortious interference with lease claim, I award Shore compensatory damages of $134,995.21, consisting of rent for the balance of the lease term of $127,095.21 and mold clean-up costs of $7,900.00. I also award Shore punitive damages of $25,000.00. I also award Shore its attorneys' fees, the costs of this action, and pre- and post-judgment interest at the applicable rate.[32] The responsible defendants are Alex J. Pires, Jr., Highway I Limited Partnership and Outlet Wines, LLC, who are jointly and severally responsible. Pires does not escape liability for his tortious actions even though at times he may have been acting as an employee of one or more of the defendants.[33]

Even though Shore obtained a default judgment against Kiran Patel, I have not assessed any damages against him because I have concluded that he did not conspire with the other tenants to breach Bhole's lease. There was simply no evidence indicating

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[30] The pre-judgment interest is limited to the award of rent. Each monthly payment of rent was due at a certain time and will accrue interest from that date due until paid. Shore also was entitled to its attorneys' fees under the lease, making its attorneys' fees an element of damages for this claim and Shore's claim for tortious interference with its lease with Bhole.

[31] 8 *Del.C.* § 259. See *Fitzsimmons v. Western Airlines, Inc.,* 290 A.2d 682, 685 (Del. Ch. 1972) ("It is thus a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties 'attach' to the surviving corporation and may be 'enforced against it.' In short the survivor must assume the obligations of the constituent.").

[32] See footnote 30.

[33] "While an employer is liable for the torts of its employees committed while acting within the scope of his employment, *Fields v. Synthetic Ropes, Inc.,* 215 A.2d 427 (1965), this does not relieve an employee of liability. See Generally 53 Am. Jur. 2d Master and Servant § 446 et. Seq." *Zaleski v. Mart Associates*, 1988 WL 97900, at *2 (Del. Super. Sept. 14, 1988).

that he was a part of the other defendants' plan to gain control of Bhole and move the liquor store to the Salvation Army building in violation of its lease with Shore.

I will prepare an order of judgment after Shore submits its application for attorneys' fees and costs. I will allow Shore 10 days to do that. I will allow the defendants 10 days to comment on Shore's application for attorneys' fees and costs.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley