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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
02 FEB 13 PM 3:53

In re:	)	Case No. 01-20178
DODECANESE, INC.,	)	Chapter 11
Debtor.	)	Judge Pat E. Morgenstern-Clarren
DODECANESE, INC., et al.,	)	Adversary Proceeding No. 01-1452
Plaintiffs,	)	
v.	)	**MEMORANDUM OF OPINION**
DEVELOPERS DIVERSIFIED REALTY CORPORATION, et al.,	)	
Defendants.	)	

The Debtor, Dodecanese, Inc., operates a restaurant as a tenant in a shopping center. The Debtor's obligations to the landlord are guaranteed by five individuals. Four guarantors and the Debtor claim in this Adversary Proceeding that the landlord breached the lease, which entitled the Debtor to pay reduced rent. They seek a declaratory judgment to that effect, together with a refund of the alleged overpayment. The landlord denies any breach, and counterclaims for unpaid rent. The case was tried on January 11 and 15, 2002.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

THE COMPLAINT AND COUNTERCLAIM

The Debtor and guarantors Frank Langos, John Langos, Steve Langos, and Julie Langos[1] filed a complaint for declaratory judgment, injunctive relief, compensatory and punitive damages, and attorneys fees against Developers Diversified Realty Corporation and DDR Down Reit LLC. Count One is for a declaratory judgment that the Debtor owes less rent than it has paid[2] and Count Two is for breach of contract and unjust enrichment. Counts Three and Four, for fraud, were withdrawn at trial. The guarantors, who were represented by separate counsel, essentially adopted the position taken by the Debtor at trial and in the briefs, with one exception discussed later in this Opinion.

The Defendants answered denying liability and counterclaimed[3] for unpaid rent through the time of trial. As of December 1, 2001, the rent allegedly due totaled $129,057.46.

FACTS

These findings of fact reflect the Court's weighing of all of the evidence presented at trial, including determining the credibility of the witnesses. In doing so, the Court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements

[1] The fifth guarantor, Nora Langos, is not a party. *See* Guarantee (Def. Exh. B) and complaint.

[2] The complaint states that this Count is brought under Ohio Civil Rule 57 and Ohio Revised Code § 2721.03. The Court assumes that the claim is actually brought under federal law. In any event, the Defendants have noted the inconsistency, but not raised a challenge based on it.

[3] The body of the pleading refers to this as a crossclaim. It is actually a counterclaim under FED. R. BANKR. P. 7013 and the Court has treated it as such. At trial, the Plaintiffs disputed the liability, but did not challenge the amount that would be due if the Defendants prevailed.

were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52.

A. The Lease and Amendments to It

On April 21, 1997, the Debtor entered into a lease ("Lease") with Developers Diversified Realty Corporation ("Landlord") to operate a restaurant under the trade name "Steve's Place" in space located in a shopping center in Aurora, Ohio ("Shopping Center").[4] The 10-year Lease called for a fixed rent of $8,575.00 per month for the first three years, and higher rent thereafter. The Lease was guaranteed by five members of the Langos family: Julie, Steve, Frank, John, and Nora.

On January 30, 1998,[5] the parties entered into a "First Amendment and Supplement to Lease" which, among other things, increased the Landlord's construction funding, raised the monthly rent to $10,121.25 for the first three years, and changed Article IX of the Lease ("First Amendment"). The Lease had provided in Article IX, paragraph C:

> **IX. USE OF PREMISES BY TENANT**
>
> C. Provided Tenant is open and operating in the Premises and not otherwise in default of any obligation under this Lease beyond the applicable cure period, Landlord agrees that it will not lease any other space in the [S]hopping Center for the operation of a bar or lounge; provided, however, the foregoing covenant shall not preclude the operation of a bar or lounge as an incidental use for a restaurant.

(Emphasis added). Paragraph 8 of the First Amendment added this paragraph D to Article IX:

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[4] Developers Diversified Realty Corporation later assigned the lease to co-Defendant DDR Down Reit, LLC. For ease of the reader, no distinction is drawn between the two entities in this Opinion.

[5] The document is dated 1997, but the evidence shows that it was actually 1998.

> D. **Exclusive Use**. Provided that Tenant [Debtor] is in possession of the Premises and operating its business therein without default, Landlord agrees that it will not enter into a lease or consent to the use and occupancy of any other space within the building outlined in yellow on Exhibit 2 attached hereto and made a part hereof by a tenant, subtenant, assignee, licensee or concessionaire (collectively "Occupant") whose principal business is the operation of sit-down family restaurant, food operation or for the sale of liquor, beer or wine for on-premises consumption (the "Exclusive Use"). Notwithstanding anything to the contrary contained herein, the foregoing Exclusive Use shall not be applicable to the premises occupied by Heinen's, the occupant of any outparcel adjacent to the Shopping Center, any existing Shopping Center tenant whose lease, as of the date of the Lease, does not prohibit the subject premises to be used in violation of the Exclusive Use, any use similar to that of Arabica or Starbucks, or any of their successors, assigns or replacements. In the event Tenant ceases to operate it[sic] business in the Premises or defaults under the terms and conditions contained in the Lease beyond any applicable cure period, the Exclusive Use shall terminate as of the date Tenant ceases to operate its business in the Premises or the date of the default cure period shall lapse, whichever shall be the case, and thereafter the Exclusive Use shall be null, void and of no further effect.
>
> In the event of a violation of the foregoing covenant by Landlord, Tenant shall not be entitled to monetary damages nor shall Tenant be entitled to injunctive relief. Tenant's sole remedy shall be to either (i) terminate the Lease, or (ii) remain in possession of the Premises and continue to operate its business therein subject to an adjustment in the computation of rent as hereinafter provided.

Under the terms of the First Amendment, the Debtor had to exercise the option to terminate within 30 days after the date on which a tenant violating the Exclusive Use provision opened for business. If the termination option was not timely exercised, the Debtor's remedy was to pay a percentage rent of 3% of gross sales (rather than the fixed amount) until such time as the violation ceased.

The parties signed at least three duplicate originals of the First Amendment, with one going to the Landlord, one going to the Debtor, and one going to George Tsarnas, the experienced real estate lawyer who represented the Debtor and guarantors in the Lease and First Amendment negotiations.

On May 18, 1998–at a time when there was no particular dispute between the parties–the Landlord's attorney wrote to Mr. Tsarnas, stating that he had discovered this error in paragraph 8 of the First Amendment:

> Paragraph 8 of the amendment incorporates an exclusive use covenant granted to the tenant; however, the exclusive use covenant is limited to the tenant's building which is outlined in yellow on Exhibit 2 of the lease. Attached to the amendment is a site plan of the shopping center with the tenant's building outlined in yellow. The error that was made was that the exhibit was marked as Exhibit A, rather than Exhibit 2. In addition, paragraph 10 of the amendment goes on to delete Exhibit A of the original lease and substitute Exhibit A attached to the amendment.
>
> This correspondence will confirm that Exhibit A attached to the amendment is intended to be Exhibit 2 which is referred to in paragraph 8 of the amendment and is intended to establish the limited area in the shopping center to which the exclusive use covenant applies. There is no substitution of Exhibit A to the lease.
>
> Unless I receive your written objection to the foregoing statements within ten (10) days from the date hereof, it will be presumed that your client concurs with the matters described above.

(Emphasis added). In other words, at the time the parties entered into the First Amendment, they had incorrectly labeled the exhibit as "A" rather than as "2". Mr. Tsarnas did not respond or take exception to this letter in any way.

The parties later entered into two additional Lease amendments, no term of which is in material dispute.

B. The Debtor's Default

When the Debtor finally opened for business in July or August 1999, it defaulted in rent payments fairly quickly. The Landlord sent the Debtor a default notice on October 5, 1999 giving the Debtor five days to cure the default by paying $40,242.66 in rent. (*See* Lease, Art. XVI, which provides that late rent can be paid within 5 days after notice). The Debtor made a partial payment outside of the cure period, but continued to be in default. By December 2000, the default had reached $52,779.47. The Landlord sent another default letter which caused the Debtor to pay the demanded amount in full. In making this payment, the Debtor did not make any claim that the rent should be calculated on a percentage basis based on a violation of the Exclusive Use clause.

The Debtor immediately fell back into default for the January and February 2001 rent. On February 22, 2001, the Landlord sent yet another default letter. This time, the Debtor responded through new counsel that the Landlord had been in violation of the Exclusive Use clause since October 1999. The alleged violation was the operation of Café Tandoor, a sit-down family restaurant which opened in June 2000 in a Shopping Center building that is across a parking lot from the Debtor's restaurant. As its remedy for the alleged breach, the Debtor elected to pay reduced rent and demanded that the Landlord refund the difference between the rent already paid and the reduced rent that was actually owed.

State court litigation followed, and then the Chapter 11 case. Additional facts are set forth below.

ISSUE

Is the Debtor entitled to invoke the Exclusive Use clause and pay the reduced rent?

DISCUSSION

Café Tandoor is a sit-down family restaurant with a liquor license that is located in the Shopping Center. This restaurant opened after the Debtor began to do business in the Shopping Center. If Café Tandoor falls within the protected space identified in the First Amendment, and if the Debtor was not in default under the Lease, as amended, then the Landlord violated the Exclusive Use clause.[6]

A. Was the Debtor in default under the Lease when Café Tandoor opened?

The relevant language of the Exclusive Use clause bears repeating:

> Provided that Tenant [the Debtor] is in possession of the Premises and operating its business therein without default, Landlord agrees that it will not enter into a lease or consent to the use and occupancy of any other space within the building outlined in yellow on Exhibit 2 attached hereto . . . by a tenant . . . whose principle business is the operation of [a] sit-down family restaurant. . . . In the event Tenant . . . defaults under the terms and conditions contained in the Lease beyond any applicable cure period, the Exclusive Use shall terminate as of . . . the date [on which] the default cure period . . . lapse[s], . . . and thereafter the Exclusive Use shall be null, void and of no further effect.

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[6] This assumes, without deciding, that the Café Tandoor space was not exempted from the Exclusive Use clause under another part of the lease. Specifically, the Landlord argued that the clause did not apply because Café Tandoor is located in a space formerly occupied by a sit-down family restaurant called Midori. The Landlord argues that it had the right to re-lease the space to Café Tandoor for a similar use without violating the Exclusive Use clause. The Debtor denies that the facts showed Café Tandoor was exempted because of this. However, it is not necessary to reach that issue in this Opinion.

(First Amendment, ¶ 8(D)). The Debtor only had the benefit of the provision, therefore, if the Debtor was not in default. The Debtor, however, had defaulted in rent payments as early as October 1999 and continued in default until making the lump sum payment in December 2000.

The Debtor argued that the Landlord did not prove the default because it did not establish the exact arrearage owed by the Debtor in June 2000, when Café Tandoor opened. The Debtor's theory, in part, is that even if the Debtor had defaulted at some earlier point which meant that it could not invoke the Exclusive Use clause, that clause sprang back into existence when the Debtor cured the default. There are, however, at least two problems with this theory. First, the testimony showed that the Debtor was in default essentially continuously from the beginning of the Lease until the back rent was paid in December 2000. There was no need to prove an exact amount that was due in June 2000. And second, the contractual language states that when a default extended beyond the cure period, the Exclusive Use clause became "null, void, and of no further effect." Even if the Debtor had cured the default before Café Tandoor opened–which it did not–the earlier default(s) had terminated the Exclusive Use clause once and for all, that being the generally accepted meaning of the phrase "null, void, and of no further effect."

In sum, the Exclusive Use clause terminated when the Debtor defaulted and failed to cure the default under the Lease, which means that the Debtor lost the benefit of the clause and is not entitled to pay reduced rent, even if there had been a breach.

B. <u>Even assuming that the Debtor was not in default under the Lease, did the Landlord breach the Exclusive Use clause?</u>

The Debtor claims that the Landlord violated the Exclusive Use clause by leasing space to Café Tandoor. The factual issue here is whether Café Tandoor operates in the Exclusive Use

area given to the Debtor, defined in the First Amendment as "within the building outlined in yellow on Exhibit 2 . . . ." As stated, it seems as if this question should be easy to answer simply by looking at Exhibit 2 (actually Exhibit A, as discussed above). The parties, however, offered into evidence two duplicate originals of the First Amendment, which are identical in all respects except for the critical exhibit.

First, a word as to the undisputed, pre-printed part of the exhibit. The exhibit is a site map of the proposed redevelopment of the entire Shopping Center. Among other things, it shows a building on the southeast side, 11,000 square feet of which is marked "Steve's Place." There is another building shown on the northwest side with 16 commercial spaces. The two buildings are separated by a large parking lot. There is no dispute over the fact that the Debtor operates its restaurant in the south building and Café Tandoor operates in the north building.

Now to the Debtor's version of the exhibit. (Pl. Exh. 3). The Debtor's exhibit has two large areas colored in solid blocks of yellow; one is the north building and the other is the south building, including a space marked "Steve's place 11,000 SF". The Debtor's copy had been stored in the safe of a family member during this litigation. If this exhibit is genuine, then the Exclusive Use clause includes both the north and south buildings and the Landlord violated the clause by allowing Café Tandoor to open.

This is in contrast to the Landlord's version of the exhibit. (Def. Exh. C). The Landlord's exhibit shows only one building outlined in yellow. That outlined space is the part of the south building that is marked "Steve's Place 11,000 SF." The Landlord's position is that this is the exhibit that was attached to the First Amendment, but that the parties made a mistake in the outlining. The Exclusive Use space outlined should have included the Steve's Place space (as it

did), but it should also have included the balance of the south building in which that space is located. If the Landlord's version is the true exhibit, then the Exclusive Use area is limited to the south building and the Landlord did not violate the contract by leasing space in the north building to Café Tandoor.

At trial, Attorney George Tsarnas testified through deposition that he still had his copy of the First Amendment in his legal file. He produced it and confirmed that the exhibit attached is identical to the one offered into evidence by the Landlord.

The major differences between the two exhibits then, are:

1. The area covered; and

2. The use of outlining v. solid colored blocks to set off the Exclusive Use area.

After considering all of the testimony, the Court finds that the Landlord's exhibit is the genuine exhibit and that the parties intended the Exclusive Use area to be the entire south building. The Court reaches this conclusion for these reasons:

1. The First Amendment refers to the Exclusive Use area as being "outlined in yellow" on the exhibit. The Landlord's exhibit has a space that is outlined. The Debtor's exhibit does not have any space outlined, but instead has spaces that are solidly colored. The Landlord's exhibit is consistent with the First Amendment language.

2. The First Amendment states that the Landlord will not enter into a lease of "any other space within the <u>building</u> outlined in yellow . . . ." (Emphasis added). The use of the singular word "building" is consistent with the one building outlined in the Landlord's exhibit and is inconsistent with the two buildings highlighted in the Debtor's exhibit.

3. If the exclusive area included both the north and south buildings, there would be little if any need for an exhibit to be attached at all. Instead, the parties would most likely have said in the text that the Exclusive Use clause applied to the entire Shopping Center, with the specific stated exceptions for Heinen's and the other named spaces. This is, in fact, how the parties addressed a similar issue in the original Lease.

4. The duplicate original retained at all times by Attorney Tsarnas, who represented the Debtor and guarantors in the negotiations, is identical to the Landlord's exhibit. The Debtor's exhibit, which differed from its lawyer's, had been in the possession of a Langos family member, certainly an interested party, for some period of time before trial. There was, therefore, an opportunity to alter the Debtor's document as well as a motive.

5. The May 18, 1998 letter from the Landlord to Mr. Tsarnas which corrected the name of the exhibit was written months before this dispute arose between the parties. The letter referred to the Exclusive Use area as being "limited to the [Debtor's] building," although that was not the point of the letter at the time. If this had been an inaccurate statement of the existing agreement, it is more likely than not that Mr. Tsarnas would have protested in response. This also gives credence to the Landlord's testimony that the parties intended to outline all of the south building, not just the Steve's Place space. Including only the Steve's Place space would not give the Debtor anything in the way of protection from competition. On the other hand, including all of the south building [i.e. "the [Debtor's] building"] *would* give Steve's Place some protection from competition in the same part of the Shopping Center.

6. Frank Langos, who is primarily responsible for the day-to-day operations of Steve's Place, testified at trial about how he came to have a First Amendment with a different

exhibit attached. Having observed him and considered all of the evidence, the Court did not find his account to be at all credible. Also, although Frank Langos testified that his father, Steve Langos, was with him when he received the First Amendment, Steve Langos did not have any specific recollection of those events.

7. Frank Langos knew as early as June 2000 that Café Tandoor was in operation as a sit-down family restaurant across the parking lot. Despite that, and for reasons that the Court finds unconvincing, Frank Langos did not complain that the restaurant violated the Exclusive Use clause. If the exhibit really included the space occupied by Café Tandoor, it is more likely than not that the Debtor would have protested paying the fixed rent far sooner than it did. Instead, the Debtor paid the rent in full in December 2000.

8. On the other hand, there are also a few inconsistencies on the Landlord's side, including the Landlord's admission that the exhibit attached to its version of the First Amendment, while genuine, does not include all of the space that the parties intended to assign to the Exclusive Use area. Additionally, when an issue arose about possibly renting Shopping Center space to a pub, the Landlord sent a letter to the Debtor that is arguably inconsistent with its position. The Landlord's explanations, however, were credible even if they showed less than the appropriate attention to detail.

On balance of all of the arguments and evidence, the Court finds that the First Amendment entered into by the parties had an exhibit attached to it that had only one area highlighted in yellow and that area did not include the Café Tandoor space. The Court finds further that the Debtor, like its lawyer, received an exhibit that had only one building outlined in yellow and that someone acting on behalf of the Debtor or the guarantors altered the exhibit by:

(1) coloring in the south building that had previously just been outlined; and (2) then coloring in the north building to make it appear that Café Tandoor was in the Exclusive Use area. Consequently, the Landlord did not breach the Exclusive Use clause by leasing space to Café Tandoor and the Debtor is not entitled to a rent reduction based on that action, even if the Exclusive Use clause had not been terminated by the Debtor's default in rent payments.

The Plaintiffs' unjust enrichment claim is premised on the Landlord having breached the contract. As the Landlord did not breach the contract, it is not unjustly enriched by retaining the original monthly rent specified in the First Amendment.

Counsel for the guarantors suggested for the first time in closing argument and through a post-trial letter that Steve Langos's guarantee was void for lack of mutuality because he cannot read or write English and the guarantee is written in English. (Docket 26). Although it is not clear whether this is intended to be a claim or a defense, either way it was not timely raised and is denied for that reason. To the extent that it could be considered a motion to amend the complaint to conform to the evidence, the motion is denied. Steve Langos, who was born in Greece, testified at trial. Regardless of any difficulty he may have with English, he is clearly an intelligent, experienced businessman who understood what he was doing and was represented by counsel of his choice in this transaction. In any event, there was no evidence to the contrary.

CONCLUSION

Judgment will be entered in favor of the Defendants and against all Plaintiffs on the Complaint and in favor of the Defendants and against all Plaintiffs, jointly and severally, on that part of the Counterclaim that seeks damages in the amount of $129,057.46 in unpaid rent through

December 31, 2001, together with an additional $20,242.50 in rent that became due on January 1, 2002 and February 1, 2002, for a total of $149,299.96.

The Defendants did not present evidence at trial with respect to their attorneys fees claim and that claim is, therefore, denied. Similarly, although Defendants included a demand in their prayer for relief that the Debtor return the leased space to them, they did not present evidence or argument on this issue and the Court will not, therefore, address it in the context of this Adversary Proceeding.

The Court will enter a separate Judgment reflecting this decision.

Date: 13 February 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on:
Robert McIntyre, Esq.
Thomas Colaluca, Esq.
Marvin Karp, Esq.
Christopher Meyer, Esq.

By: Joyce L Gordon, Secretary
Date: 2/13/02

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:	Case No. 01-20178
DODECANESE, INC., Debtor.	Chapter 11
	Judge Pat E. Morgenstern-Clarren
DODECANESE, INC., et al., Plaintiffs,	Adversary Proceeding No. 01-1452
v.	
DEVELOPERS DIVERSIFIED REALTY CORPORATION, et al., Defendants.	**JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment on the Complaint is entered in favor of the Defendants. IT IS FURTHER ORDERED that Judgment on the Counterclaim is entered in favor of the Defendants and against the Plaintiffs, jointly and severally, in the amount of $149,299.96.

Date: 13 February 2002

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Robert McIntyre, Esq.
Thomas Colaluca, Esq.
Marvin Karp, Esq.
Christopher Meyer, Esq.

By: Joyce L. Gordon, Secretary
Date: 2/13/02