STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: February 11, 2014]

THE PIER OF NEWPORT, LLC.	**:**	
	:	
v.	**:**	**C.A. No. NC 2011-0502**
	:	
N.A.J. ASSOCIATES, L.L.C.	**:**	
and N.A.J. PROPERTIES, L.L.C.	**:**	

DECISION

VAN COUYGHEN, J. This matter is before the Court for decision following a nonjury trial. For the reasons set forth in this Decision, the Court finds in favor of the Defendants and awards them damages in the amount of $392,268. This Court has jurisdiction pursuant to G.L. 1956 §§ 8-2-13 and 8-2-14 and renders its decision in accordance with Rule 52 of Rhode Island Superior Court Rules of Civil Procedure.

I

Facts

This case involves a dispute between the parties to a commercial lease of a restaurant. Plaintiff is The Pier of Newport, LLC. (Plaintiff). Petros and Charalambos Kyriakides are brothers and the sole members of the limited liability company. Defendants and Counterclaim Plaintiffs are N.A.J. Associates, L.L.C. and N.A.J. Properties, L.L.C. (Defendants). N.A.J. Associates, L.L.C. owns the restaurant business and the liquor license. N.A.J. Properties, L.L.C. owns the real property and improvements thereon. Vincent Sandonato (Mr. Sandonato) is the sole member of both companies. Plaintiff leased the property and the liquor license from Defendants.

The parties entered into a written Lease Agreement (Lease) on December 2, 2009. (Joint Ex. 1 or Lease). Plaintiff's obligations pursuant to the Lease were personally guaranteed by Petros and Charalambos Kyriakides. (Joint Ex. 1).[1] The subject of the Lease was a commercial property located at Howard's Wharf in Newport, and known as The Pier Restaurant. The restaurant is constructed on a wharf overlooking Newport Harbor and Narragansett Bay. The restaurant contains a bar/lounge area and two dining rooms. The smaller dining room, known as The Iris Room, contained a bar referred to as the "Martini Bar." The Martini Bar is at the heart of this controversy.

The Lease is a detailed commercial lease and was drafted by the attorneys for the parties. In real estate parlance, the Lease is referred to as a "triple net" lease. The parties have submitted the Lease as Joint Exhibit 1. A triple net lease requires that the lessee pay monthly rent and all expenses associated with the property, such as taxes, insurance, utilities, maintenance, and repairs. See Joint Ex. 1, ¶¶ 4, 5. The Lease also contained an Option to Purchase the real property, personal property, and the liquor license associated with the premises. (Joint Ex. 1, ¶ 26).

As the Lease formed the basis for the relationship between the parties, it is necessary to review it in some detail. The term of the Lease spanned from January 1, 2010 to 11:59 PM on October 31, 2011. (Joint Ex. 1, ¶ 2). Base rent in the amount of $15,000 per month for the first year and $17,000 per month for the remaining term was due and payable, in advance, on the first of each month. (Joint Ex. 1, ¶ 3). In addition to the base rent, Plaintiff was responsible for additional rent including real estate taxes, insurance premiums, and all utility costs, throughout the term of the Lease. (Joint Ex. 1, ¶ 4).

[1] This Court notes that the signature page of the Lease is not numbered but appears as the 16th and final page of the Lease.

Plaintiff was also responsible for the maintenance of the building, including structural maintenance and repairs. (Joint Ex. 1, ¶¶ 5.3, 5.4). However, Plaintiff could not make structural renovations, alterations, or improvements without the landlord's prior written consent. (Joint Ex. 1, ¶¶ 5.2, 6).

Paragraph 6 of the Lease entitled "Alterations" reads as follows:

> "6) ALTERATIONS: Tenant shall not make any structural alterations, additions and/or improvements to the Leased Premises without the prior written consent of the Landlord, which consent shall not be unreasonably withheld. Tenant, together with its request to make alterations, shall submit architectural drawings, structural renderings, specifications and the like to the Landlord for his review and approval. Landlord shall have two weeks from the date the Landlord receives the request and supporting material from the Tenant within which to respond to Tenant's request."

Plaintiff accepted the premises "AS IS" and acknowledged that the leased premises were in good order and condition, and sufficient for the uses intended by Plaintiff. (Joint Ex. 1, ¶ 5.1).

The Lease also contained a condition precedent. The Lease required that Defendant transfer the liquor license held by N.A.J. Associates L.L.C. to The Pier of Newport, L.L.C. forthwith. If for any reason the liquor license was not transferable, Plaintiff had the right to terminate the Lease. (Joint Ex. 1, ¶ 2.2). Upon expiration of the Lease, Plaintiff was required to "peaceably yield" the liquor license back to N.A.J. Associates, L.L.C. Id. The Lease required that Plaintiff execute the following documents, in advance, to effectuate return of the liquor license to N.A.J. Associates L.L.C. at the end of the Lease:

> "(a) a collateral assignment transferring to Landlord all of Tenant's right, title and interest in and to the liquor license and other applicable licenses held for the Premises . . . (b) a Special Power of Attorney granting Landlord the power to execute all documentation necessary to transfer the licenses to Landlord . . . and (c) blank City of Newport application forms for the transfer [of], [sic] such licenses to the Landlord, all of which shall be held in escrow with the Landlord's attorney and which Landlord shall

> be entitled to effectuate in the event of the termination of this Lease Agreement." (Joint Ex. 1, ¶ 7.3); see also Joint Exs. 3, 2 and 4 respectively.

The parties agree that the liquor license was originally transferred to Plaintiff in an expedient manner and without incident.

As stated above, the Lease also contained an Option to Purchase. (Joint Ex. 1, ¶ 26). Paragraph 26(a) reads as follows:

> "26. OPTION TO PURCHASE PREMISES
>
> "(a) Tenant shall have the right to purchase the Premises for the sum of THREE MILLION FIVE HUNDRED THOUSAND ($3,500,000) DOLLARS the ("Purchase Price") by delivering a written notice to Landlord of Tenant's election to Purchase the Premises on or before September 1, 2011. The Purchase Price shall be payable as follows: 1) Two Million Dollars ($2,000,000) in cash, certified check from a Rhode Island Bank, or by wire transfer at Closing and 2) a Promissory Note in the amount of One Million Four Hundred Thousand Dollars ($1,400,000.00) made payable to Landlord (reflecting credit of the $100,000 paid by Tenant on or before December 31, 2010, pursuant to Section 3 hereof). The promissory note shall [sic] bear an interest rate of 7%, shall be amortized over ten years and may not be pre-paid (sic) during the first 5 years. The Closing shall take place on or before the 60th day following the delivery of the Notice to Purchase. This option shall expire on September 1, 2011. The Note shall be secured by a first mortgage on the Leased Premises and with a security interest in the Liquor License, furniture, fixtures, equipment and inventory utilized in connection with the operation of the restaurant business located at the Leased Premises. Time shall be of the essence with respect to such purchase."

Paragraph 3(b) specified the terms associated with the consideration for the Option. It mandated that the consideration of $100,000 be paid on or before December 31, 2010. (Joint Ex. 1, ¶ 3). Other facts associated with the Lease will be addressed later in this Decision as needed.

Plaintiff's first witness was Petros Kyriakides. Mr. Kyriakides testified regarding his experience in the restaurant business dating back to 1973. He testified that he and his brother owned companies that owned a variety of hotels and restaurants in Newport County. He also testified that he and his brother had at least four meetings with Mr. Sandonato in the fall of 2009 to discuss leasing The Pier Restaurant with the Option to Purchase. Those discussions resulted in the Lease and Option to Purchase as reflected in Joint Exhibit 1.

Mr. Kyriakides testified that he was allowed early access to begin preparing the restaurant which had not been open since September 2008. See Joint Ex. 1, ¶ 2.1. He testified extensively about the initial repairs and renovations he made in order to increase the functionality of the restaurant. The restaurant opened in mid-February 2010.

As stated above, the smaller dining room known as The Iris Room contained a bar known as the "Martini Bar." Mr. Kyriakides testified that he wanted to expand the seating in The Iris Room to accommodate private parties, so he removed the Martini Bar in April 2010. He estimated that the removal of the Martini Bar allowed for an additional ten to twelve tables of four. The Martini Bar was approximately twenty-seven feet long and spanned the entire width of The Iris Room. It was secured to the side walls and the floor. It was a fully functional bar and had all the requisite plumbing and electrical accoutrements necessary for a full service commercial bar. The Martini Bar is depicted in photos contained in Joint Exhibit 16 and Plaintiff's Exhibit 5.

Mr. Kyriakides testified that he told Mr. Sandonato on at least two occasions prior to signing the Lease that he wanted to remove the Martini Bar. It is not disputed that Plaintiff did not request or receive written permission to remove the Martini Bar as required by Paragraph 6 of the Lease. Mr. Kyriakides also testified that at one point after the bar had been removed, he

told Mr. Sandonato that he would replace the Martini Bar if Mr. Kyriakides did not purchase the property.

As referenced above, the consideration for the Option to Purchase was not required to be paid when the Lease was signed. The Option required payment on or before December 31, 2010. (Joint Ex. 1, ¶ 3(b)). Mr. Kyriakides testified that the consideration of $100,000 for the Option to Purchase was paid on January 1, 2011.[2]

He also testified that he received the letter from Defendants' lawyer in mid-January of 2011, notifying him that the Defendants considered that The Pier of Newport, LLC. had violated the terms and conditions of the Lease.[3] The letter specified eight violations, including the removal of the Martini Bar. See Joint Ex. 5.

The parties were unable to resolve their differences, and the relationship continued to deteriorate. The letters culminated on July 31, 2011, with a letter from Defendants' lawyer to Plaintiff's lawyer stating that the Lease violations had not been cured and that Defendants considered Plaintiff to be "irretrievably IN DEFAULT." (Joint Ex. 10). The letter went on to state that Plaintiff's rights under the Lease were extinguished. Id. Despite the above-referenced letters, Plaintiff continued to remain in possession of the premises, pay rent, and conduct business as a restaurant.

Mr. Kyriakides testified that Plaintiff did not exercise the Option to Purchase on or before September 1, 2011. He stated that he believed that the Defendants had "repudiated" the Option.

---

[2] Although the Lease required payment by December 31, 2010, the record does not reflect that the Defendants ever contested the validity or timeliness of payment.

[3] The letter from Defendants' attorney is actually dated February 24, 2011. Mr. Kyriakides testified that the parties met at Mr. Sandonato's attorney's office in April 2011 to try to resolve their differences. The parties introduced Joint Exhibits 5 through 10, which constitute correspondence between the parties and their lawyers and evidence the chronology and substance of the disputed Lease violations.

He also testified that he did not have bank financing to satisfy the financing requirements contained in the Option to Purchase. However, he did testify that a family friend from Connecticut was willing to lend him 1.5 million dollars in May 2011. He also testified that a gentleman from Jamestown, Rhode Island was willing to lend him one million dollars in July of 2011.[4]

In support of Plaintiff's claim for damages, Mr. Kyriakides presented 695 pages of receipts allegedly documenting the expenses associated with opening and running of the restaurant. (Pl.'s Ex. 4). The expenses totaled $490,076.51 and include everything from maintenance to advertising.[5] Id.

The expenses span the length of the Lease and are reflected in Plaintiff's Exhibit 4. Mr. Kyriakides testified that he spent the money in reliance on purchasing the property in accordance with the Option to Purchase contained in the Lease. He also testified that the majority of the expenses were spent at the beginning of the Lease.

Mr. Kyriakides also testified that some of the expenses contained in Plaintiff's Exhibit 4 were paid, not by The Pier of Newport, LLC., but by other companies owned by his brother and him. In fact, Plaintiff's Exhibit 4 reflects that a portion of the expenses were, in fact, paid by The Pier of Newport, LLC. However, proof of payment and the source are sporadic. Mr. Kyriakides also testified on cross-examination that many of the maintenance expenses contained in Plaintiff's Exhibit 4 were Plaintiff's responsibility pursuant to the terms of the Lease. See Joint Ex. 1, ¶ 5. In addition, some of the expenses contained in Plaintiff's Exhibit 4 were for

[4] Mr. Kyriakides provided the names of the alleged lenders. There is no need to include the names in this discussion.

[5] The expenses do not include the cost of food or beverages.

equipment and merchandise such as knives, forks, plates and glassware that were removed from the premises at the expiration of the Lease.

On cross-examination, Mr. Kyriakides testified that he derived financial benefit from some of the expenditures such as advertising, contained in Plaintiff's Exhibit 4. Plaintiff did not present any evidence of income, net profit, or loss associated with running the restaurant during the term of the Lease. Plaintiff's only evidence of damages is the expenses contained in Plaintiff's Exhibit 4 and the payment of the $100,000 paid on January 1, 2011, in consideration for the Option to Purchase. See Joint Ex. 1, ¶ 3(b).

Mr. Kyriakides testified that he allowed the employees to have a party for the staff and some of the regular patrons prior to vacating the restaurant. The party occurred on November 27, 2011. Mr. Kyriakides was not present at the party, nor was his brother. He testified that his manager, Charles Holder, was present. He also testified that upon arriving at the restaurant the morning after the party, he witnessed graffiti written on the restaurant walls. See Defs.' Ex. I. Some of the graffiti included graphic and vulgar caricatures of Mr. Sandonato. See id. He testified that he was embarrassed by the graffiti and told Mr. Holder and the staff to paint and clean the restaurant.

On November 30, 2011, The Pier of Newport, LLC. vacated the restaurant. Mr. Kyriakides testified that a photographer took the photos reflected in Plaintiff's Exhibit 3, which he said depicted the condition of the restaurant as it appeared on that date.

Plaintiff's second witness was Attorney David P. Martland. Mr. Martland testified that he represented Plaintiff in relation to the Lease and the Option to Purchase at issue. Mr. Martland testified that he wrote to Plaintiff's attorney on August 19, 2011, requesting a sixty day extension in which to exercise the Option to Purchase. (Joint Ex. 11) The letter stated that an

appraisal of the property valued it at approximately 2.45 million dollars[6] and, thus, Plaintiff had to pursue using its other properties as collateral. Id.

Mr. Martland hand-delivered the August 19, 2011, letter to Defendants' attorney. At that meeting, he testified that he told Defendants' attorney that he had advised his clients not to exercise the Option because they did not have the financing commitments from the banks.

Defendants' attorney responded to Mr. Martland in a letter dated August 22, 2011, stating that it was his clients' opinion that the Plaintiff no longer had an Option to Purchase as a result of the breach. (Joint Ex. 12). Furthermore, even if the Option did remain viable, Defendants' attorney explained his clients would not agree to extend the Option. Id.

On September 1, 2011, the date the Option was to expire, the attorneys exchanged a series of emails relating to the Option. (Joint Ex. 15). Mr. Martland wrote to Defendants' attorney that Plaintiff was prepared to exercise the Option; however, given Defendants' position, it would be futile. Id. Defendants' attorney, in response, invited Plaintiff to exercise the Option if they thought it was valid. Id. Mr. Martland testified that the Option to Purchase was never exercised. It is not clear from the record what the factual basis was for Mr. Martland to state that his clients were prepared to exercise the Option in contrast to his August 19, 2011 letter stating that Plaintiff did not have financing. Plaintiff rested after Mr. Martland's testimony.

Mr. Sandonato was the first witness for the defense. He testified that he was a construction contractor and developer for forty years prior to purchasing The Pier Restaurant in 2000. After purchasing the restaurant, Mr. Sandonato testified that he spent 1.8 million dollars renovating the property.

[6] The alleged appraisal value is $1,005,000, less than the price contained in the Option to Purchase.

Included in the renovation of the property was the construction of the Martini Bar. He testified that he performed the rough construction himself and hired finish carpenters to construct the solid oak molding to accent the bar. The bar top consisted of marble tile. He testified that the bar had all the plumbing and electrical accoutrements necessary for a full service, commercial bar.

In the spring of 2008, Mr. Sandonato decided that he wanted to retire and lease the restaurant. He leased the restaurant to Aquidneck Hospitality Group, LLC for $25,000 per month, triple net. The relationship was short lived, and the lessee vacated the property in August of that year. The property remained dormant until it was rented to Plaintiff in December of 2009. Mr. Sandonato testified that he and the Kyriakides brothers became involved in discussions in October of 2009, and had several meetings which resulted in the Lease Agreement reflected in Joint Exhibit 1.

In May 2010, Mr. Sandonato visited The Pier Restaurant for lunch and discovered that the Martini Bar had been removed. He testified that he never gave Plaintiff permission to remove the Martini Bar and that he called Mr. Kyriakides the next day to voice his complaint about the removal of the Martini Bar. That event appears to have sparked a gradual, but steady decline of the relationship between the parties as referenced in the above-mentioned lawyers' letters reflected in Joint Exhibits 5, 6, 7, 8, 9, and 10.

Just prior to Plaintiff vacating the property, Mr. Sandonato visited The Pier Restaurant during the early morning hours of November 28, 2011, the day after the aforementioned staff party. He testified that the lights were on inside the building and the vulgar graffiti depicted in Defendants' Exhibit I was clearly visible. See Defs.' Ex. I. He also testified that the walls had

been painted when Plaintiff vacated the property on November 30, 2011; however, the restaurant was filthy and in disrepair.

Mr. Sandonato testified that he spent $33,321 to clean, repair and paint the restaurant so it could adequately function. He testified that the walls required numerous coats of paint because the markers used for the graffiti bled through the paint. The expenses are set forth in Defendants' Exhibits Q and P.

In addition, he testified that the various cornices had been reupholstered with a cheaper material and the cost of replacing them was $9,000. See Defs.' Ex. R. Mr. Sandonato called Alan Kaplan from Sun Ray Interiors as a witness to provide the reupholstering cost. Mr. Kaplan applied a $50 per square yard cost to replace the material. However, on cross-examination, he testified that he never saw the original cornices and did not actually know the quality of the material on the actual cornices. Mr. Kaplan said he was estimating the cost of the material as high end, but not top of the line.

Mr. Sandonato testified that three doors between the kitchen and various dining rooms also had holes cut in them. The doors are depicted in Defendants' Exhibits K3 and K4. The replacement cost for the doors was $1,488 and is set forth in Defendants' Exhibit T.

Mr. Sandonato testified that after Plaintiff vacated the property, he attempted to have the liquor license returned in accordance with the Lease. In March 2012, Plaintiff, through counsel, withdrew the pending application to transfer the liquor license, rescinded its consent to do so, and revoked the aforementioned power of attorney authorizing N.A.J. Associates, L.L.C. to act on its behalf. The license remained in Plaintiff's possession until the commencement of trial when Plaintiff voluntarily agreed to transfer the license back to N.A.J. Associates, L.L.C.

Mr. Sandonato testified that he tried to lease the restaurant in the spring and summer of 2012, but was unable to do so because the restaurant lacked the liquor license. He also testified that he tried to operate the restaurant without the liquor license from mid-June through September 20, 2012, but was losing money so he ceased operations. The restaurant remained vacant from October 1, 2012 up to the date of trial.

The Defendants called Ronald McInerney as its next witness. Mr. McInerney was qualified as an expert in the field of real estate appraisal. Mr. McInerney was hired by Defendants to provide a prospective monthly fair market rental analysis for The Pier Restaurant beginning March 1, 2012.[7]

Mr. McInerney analyzed nine "comparable rental properties" to formulate his opinion. He also considered the previous lease between Defendants and Aquidneck Hospitality Group, LLC. Mr. McInerney's opinion regarding the fair market value during the time in question was $20,800 per month, triple net.

Upon cross-examination, Mr. McInerney admitted that many of the comparables were not restaurants and that he was unfamiliar with many of the pertinent details, such as the type of liquor license and availability of off-street parking of the properties that were restaurants. Finally, Mr. McInerney provided his opinion that the restaurant was not, in fact, rentable on March 21, 2012, based upon the lack of liquor license and the pending lawsuit by Plaintiff seeking ownership and possession through specific performance.

Defendants then called Frank A. Prete as its third witness. Mr. Prete testified regarding the costs to replace the Martini Bar. Mr. Prete testified that he had forty-five years' experience in both commercial and residential construction. In fact, Mr. Prete testified that he constructed

[7] March 1, 2012 was selected, based upon the fact that Mr. McInerney thought it would take that long to transfer the liquor license.

twenty-five to thirty bars for restaurants over the past twenty-five years. Mr. Prete was intimately familiar with the Martini Bar as he witnessed its construction since its inception. He was friendly with Mr. Sandonato and would visit him regularly during construction. Mr. Prete testified regarding the high quality of workmanship and material used to construct the bar. He testified on cross-examination that the last time he saw the Martini Bar was in July of 2008, as a patron.

Mr. Prete testified that it would cost $85,650 to reconstruct the Martini Bar. See Defs.' Ex. H. Defendants' Exhibit H is a written estimate prepared by Mr. Prete regarding the construction of the Martini Bar. Defendants concede that the three beer coolers contained in the original Martini Bar were left at the property, and as a result, Mr. Prete's estimate was reduced to $75,700.

Defendants' final witness was William Mackin. Mr. Mackin has a master's degree in culinary arts and extensive experience in the restaurant business. Mr. Mackin taught culinary arts for twenty-two years at Rogers High School and has also taught food safety for the State of Rhode Island for the past twenty years.

Mr. Mackin has worked with Mr. Sandonato in the past and has provided consulting services to Mr. Sandonato regarding his restaurant and hotel. After Plaintiff vacated the premises, Mr. Mackin visited the restaurant on numerous occasions to assess its condition. Mr. Mackin testified that the restaurant needed a "good cleaning" before it was suitable to serve food. He also provided a detailed analysis regarding repairs that needed to be made to damaged or broken equipment, as well as damage to the premises. Mr. Mackin's testimony corroborated Mr. Sandonato's need for the expenditures reflected in Defendants' Exhibits Q and P. Defendants rested after Mr. Mackin's testimony.

Plaintiff called four rebuttal witnesses. The first was Charles Holder, who was the manager of The Pier Restaurant while it was leased to Plaintiff. Mr. Holder testified that he recalled a brief discussion regarding the Martini Bar in which he, Mr. Sandonato, and Mr. Kyriakides were present. He testified that Mr. Kyriakides mentioned removal of the Martini Bar during that meeting. He also testified that Mr. Sandonato did not respond to Mr. Kyriakides' comment. Mr. Holder did not know the exact date of the conversation, but thought it may have been in March of 2010. The timing conflicts with Mr. Sandonato's testimony that he was gravely ill in Kentucky at that time. He estimated the discussion lasted two minutes.

Plaintiff's second rebuttal witness was David DeAngelis. Mr. DeAngelis was a former employee of Mr. Sandonato. Mr. DeAngelis testified that he was present at a meeting with the Kyriakides brothers and Mr. Sandonato prior to signing the Lease, in which removal of the Martini Bar was discussed. He testified that Mr. Sandonato expressed "concerns" regarding the removal of the Martini Bar, such as how it would be removed and what would go in its place. He did not testify that Mr. Sandonato gave his approval to remove the Martini Bar.

On cross-examination, Mr. DeAngelis admitted that he had been convicted of embezzlement in excess of $100 and received a five year prison sentence, eighteen months to serve, the remainder suspended with probation. Mr. Sandonato was the victim in that case.

Plaintiff then called Mr. Kyriakides. Mr. Kyriakides testified that he had estimated the cost of materials to replace the Martini Bar. Mr. Kyriakides testified that the approximate cost of the materials to rebuild the Martini Bar was $8,000.

Next, Plaintiff called Nathan Godfrey as its final witness. Mr. Godfrey was qualified as an expert in the field of real estate appraisal. Mr. Godfrey testified that he was hired by Plaintiff a month prior to trial. Mr. Godfrey was asked to perform a current market rental analysis for the

property in question, so his analysis was based upon 2013 data. See Defs.' Ex. W. Mr. Godfrey testified that in his opinion, the fair market rental value for the restaurant without the liquor license was $17.85 per square foot, triple net. See id. Multiplying the rent by the square footage, Mr. Godfrey testified that the current yearly rent would be $138,927 plus expenses. See id. On cross-examination, he testified that he was not aware that the property was encumbered by Plaintiff's suit seeking ownership and possession through specific performance.

II

Travel

Plaintiff filed suit on October 6, 2011, while still in possession of the property, but after the expiration of the Option to Purchase. Plaintiff's complaint alleges breach of contract for failing to honor the Option to Purchase, unjust enrichment, promissory estoppel, and breach of implied duty of good faith and fair dealing. Plaintiff sought relief in the form of specific performance regarding the Option to Purchase, compensatory and punitive damages, and attorney's fees. On the eve of trial, Plaintiff withdrew its claim for specific performance indicating that there were structural problems with the wharf underneath the restaurant, which negatively affected its value. Plaintiff also agreed to voluntarily return the liquor license to Defendant, N.A.J. Associates L.L.C., at that time.

Defendants' amended answer and counterclaim alleges breach of contract and seeks damages as a result. Defendants also seek to impose liability on Petros Kyriakides and Charalambos Kyriakides individually as a result of their personal guarantee of the obligations contained in the Lease.

III

Analysis

Plaintiff's complaint alleges that Defendants breached the Contract when it repudiated the Option to Purchase. In order to resolve that issue, this Court must first determine whether or not Defendants' allegations of Plaintiff's breach have merit, and if so, whether or not they provide sufficient basis for Defendants' repudiation. Therefore, Defendants' claim that Plaintiff breached the Contract will be addressed first.

A

Defendants' Claim for Breach of Contract

In a claim for breach of contract, the party must prove the existence and breach of a contract and that the other party's breach caused its damages. Petrarca v. Fidelity and Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005). The elements of a contract are offer, acceptance, consideration, mutuality of agreement, and mutuality of obligation. See Smith v. Boyd, 553 A.2d 131 (R.I. 1989); Lamoureux v. Burrillville Racing Ass'n, 91 R.I. 94, 161 A.2d 213 (1960). The court must make "the predicate findings of offer, acceptance, consideration and breach requisite to determining a breach of contract claim." Gorman v. St. Raphael Academy, 853 A.2d 28, 33 (R.I. 2004). A party establishes a breach of contract claim when the party demonstrates a "violation of a contractual obligation, either by failing to perform one's promise or by interfering with another party's performance." Demicco v. Med. Assocs. of Rhode Island, Inc., et al., No. 99-2512, 2000 WL 1146532 (D.R.I. July 31, 2000) (citing Black's Law Dictionary 182 (7th ed. 1999)). The burden is on the injured party to prove by a fair preponderance of the evidence that he or she has suffered damages as a proximate result of the other party's wrongful conduct. See Bruno v. Caianiello, 121 R.I. 913, 404 A.2d 62 (1979). In addition, the injured party must prove

the extent and amount of such damages by a fair preponderance of the evidence. See Worsley v. Corcelli, 119 R.I. 260, 377 A.2d 215 (1977).

"Generally, whether a party materially breached his or her contractual duties is a question of fact." Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010). Once a contract has been established, the effect of a contractual agreement is controlled by the actual terms that are included in the contract. "When the terms are found to be clear and unambiguous, the task of judicial construction is at an end. The contract terms must then be applied as written and the parties are bound by them." Vickers Antone v. Vickers, 610 A.2d 120, 123 (R.I. 1992) (internal citations omitted). "'In the absence of ambiguity, the interpretation of a contract is a question of law.'" Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 238 (R.I. 2004) (quoting Singer v. Singer, 692 A.2d 691, 692 (R.I. 1997)). It is well settled that "[w]hen contract language is clear and unambiguous, [each word] will be given [its] usual and ordinary meaning and the parties will be bound by such meaning." Id. (internal citations omitted). "When ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect; an interpretation that reduces certain words to the status of surplusage should be rejected. Id. (citing Employers Mut. Cas. Co. v. Pires, 723 A.2d 295, 298 (R.I. 1999)).

Prior to construing the provisions of a contract, this Court must first discern whether an ambiguity exists. Vickers, 610 A.2d at 123 (citing Bush v. Nationwide Mut. Ins. Co., 448 A.2d 782, 784 (R.I. 1982)). A court shall conclude that a contract is ambiguous if it is "reasonably susceptible of different constructions." Id. (internal citations omitted). When the contested provision of a contract or agreement is capable of two separate constructions, the Supreme Court has previously stated that it should "'adopt that construction which is most equitable and which will not give to one party an unconscionable advantage over the other; and where the meaning is

doubtful, a construction which will entail a forfeiture should be avoided, especially where . . . language [used does not] expressly require[] such result.'" Id. (quoting Massasoit Housing Corp. v. Town of North Kingstown, 75 R.I. 211, 217, 65 A.2d 38, 40 (1949)).

In construing the terms of a contractual provision, our Supreme Court has recently held that the court's primary objective is to ascertain the intent of the parties. Haffenreffer v. Haffenreffer, 994 A.2d 1226, 1233 (R.I. 2010) (citing The Elena Carcieri Trust-1988 v. Enterprise Rent-A-Car Co. of Rhode Island, 871 A.2d 944, 947 (R.I. 2005)). With respect to determining the intent of the parties, our Supreme Court quite clearly summarized certain basic principles:

> "In interpreting an instrument it is basic that the intention of the parties must govern if that intention can be clearly inferred from its terms and can be fairly carried out consistent with settled rules of law. . . . In ascertaining what the intent is we must look at the instrument as a whole and not at some detached portion thereof. . . . And, although there is no ambiguity, we will nonetheless consider the situation of the parties and the accompanying circumstances at the time the contract was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in the interpretive process and to assist in determining its meaning." Hill v. M.S. Alper & Sons, Inc., 106 R.I. 38, 256 A.2d 10 (1969).

Accordingly, this Court may "consider extrinsic evidence where relevant to prove a meaning to which the language of the instrument is reasonably susceptible. . . ." Haffenreffer, 994 A.2d at 1233 (citing Harrigan v. Mason & Winograd, Inc., 121 R.I. 209, 213, 397 A.2d 514, 516 (1979); see also LPP Mortgage, Ltd. v. Sugarman, 565 F.3d 28, 31-32 (1st Cir. 2009)).

"[T]he parol evidence rule bars the admission of any previous or contemporaneous oral statements that attempt to modify an integrated written agreement." Garden City Treatment Ctr., Inc. v. Coordinated Health Partners, Inc., 852 A.2d 535, 542 (R.I. 2004). However, the Haffenreffer Court found the parol evidence rule to be inapplicable to the matter before it

because the extrinsic evidence at issue was being used to provide insight into the parties' intent at the time of the drafting of the contract and not to modify or contradict its terms. 994 A.2d at 1233-35 n.13 (citing M.S. Alper & Sons, Inc., 106 R.I. at 47, 256 A.2d at 15).[8]

Here, the parties do not contest that the Lease and Option in question were valid, binding contracts. Defendants claim that Plaintiff breached the Lease and the Option by removing the Martini Bar in direct violation of the Lease, thus justifying repudiation of the Option.[9] Paragraphs 5.2 and 6 of the Lease clearly prohibit structural alterations without the landlord's written consent. Paragraph 6 of the Lease sets forth the procedure which the tenant must follow in order to obtain landlord's approval. Paragraph 6 clearly mandates that the tenant "shall submit architectural drawings, structural renderings, specifications and the like to Landlord for his review and approval." (Joint Ex. 1).

It is not contested that Plaintiff did not comply with Paragraph 6 of the Lease. However, Plaintiff contends that the term, "structural alterations," is not applicable to the removal of the Martini Bar. Plaintiff urges this Court to apply a much narrower definition of the term "structural alterations." Plaintiff contends that Paragraph 6 only applies to alterations that affect the structural integrity of the building.[10] A "structural alteration" is "[a] significant change to a building or other structure, essentially creating a different building or structure." Black's Law Dictionary (9th ed. 2009). This definition does not support Plaintiff's limited application of the

[8] However, in Haffenreffer, 994 A.2d at 1239-40 (Goldberg, J. dissenting), Justice Goldberg opined that the majority decision disregarded that the agreement was clear and unambiguous because the Rhode Island Supreme Court has previously stated that subjective intent of the parties is inconsequential and that reference to extrinsic evidence is unnecessary when construing a clear and unambiguous contract.

[9] Although other claims for breach justifying repudiation were alleged, the evidence indicates that they were either cured or minor in nature.

[10] See Pl.'s Pretrial Brief at 9.

term "structural alterations" to those alterations which affect the structural integrity of the building, nor does the Lease when looked at in its entirety. See Joint Ex. 1, ¶ 6.

Paragraphs 5.2 and 5.3 of the Lease address the Tenant's responsibility to make renovations and repairs. Paragraph 5.2 reads as follows:

> "5.2 Renovations – Tenant. Tenant shall not make structural alterations or improvements in or to the Leased Premises without Landlord's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Any alterations, additions or improvements shall (i) if Landlord's consent is required, be in accordance with complete plans and specifications submitted by the Tenant and approved in advance by Landlord; (ii) be performed in a good and workmanlike manner and in compliance with all applicable laws, regulations, codes, ordinances and directives of any governmental agencies; including without limitation, the Americans with Disabilities Act; (iii) be performed and completed in a good and workmanlike manner *maintaining the structural integrity* . . ." (Joint Exhibit 1, ¶ 5.2) (emphasis added).

In addition, Paragraph 5.3 of the Lease entitled "Structural Repairs – Tenant," reads as follows: "During the term of this Lease Tenant shall at its own expense be responsible for all necessary repairs to the roof, other major *structural systems* constituting the exterior structure of the Building, and the parking lot and grounds within the Leased Premises." (Joint Ex. 1, ¶ 5.3). The fact that these sections of the Lease specifically differentiate "structural integrity" and "structural systems" from other structural alterations and repairs clearly supports the conclusion that the use of the phrase, "structural alterations," as referenced in Paragraph 6 of the Lease does not limit the term to alterations that affect the structural integrity of the building.

The clear and unambiguous language of the Lease required Plaintiff to obtain Defendants' approval for any significant alterations to the leased building. See Andrukiewicz, 860 A.2d at 238 (internal citations omitted). This conclusion is supported by the unambiguous definition of structural alterations as well as viewing the Lease in its entirety. See Vickers, 610

A.2d at 123 (internal citations omitted). It is also supported by common sense. Applying Plaintiff's definition to the phrase "structural alteration" would allow Plaintiff to completely transform the interior of the building, as long as it did not affect its structural integrity, without obtaining the landlord's consent. See id. (citing Pires, 723 A.2d at 298.) It is clear from reading the Lease in its entirety that the parties did not intend to confer such authority to the Lessee. To determine otherwise would give Plaintiff an unconscionable advantage over Defendants regarding alteration of the building. See Vickers, 610 A.2d at 123. Based upon this Court's determination that no ambiguity existed regarding the meaning of the phrase, "structural alteration," the extrinsic evidence associated with the removal of the Martini Bar is not relevant. See Coordinated Health Partners, Inc., 852 A.2d at 542.

It should be noted, however, that Plaintiff never argued that the extrinsic evidence was being offered to establish that the parties intended to define "structural alterations" as any alterations that affected the structural integrity of the building. Even if this argument could be inferred, this Court is not satisfied that Plaintiff met its burden of proof on this issue.

The extrinsic evidence offered by Plaintiff attempts to establish that Mr. Sandonato was aware of Plaintiff's intent to remove the Martini Bar and presented testimony regarding pre- and post-Lease discussions in which removal of the Martini Bar was mentioned. This presumably was presented to establish that Mr. Sandonato waived his right to contest its removal. However, Mr. Sandonato denies that any serious discussion regarding the removal of the Martini Bar ever occurred. He testified that when Mr. Kyriakides mentioned removal of the Martini Bar prior to signing the Lease, he told Mr. Kyriakides that if he bought the building, he could do anything he wanted to the Martini Bar. He also vehemently asserted that he never gave Mr. Kyriakides or anyone else permission to remove the Martini Bar. Importantly, there is absolutely no evidence

that Mr. Sandonato gave Plaintiff permission to remove the Martini Bar, only that he was present when it was discussed. Thus, the evidence presented is insufficient to establish that Mr. Sandonato waived the application of Paragraph 6 of the Lease.

For all the reasons stated above, this Court finds that Plaintiff's failure to comply with Paragraph 6 as it relates to removal of the Martini Bar constituted a breach of the Lease.

B

Plaintiff's Breach of the Lease as Justification for Defendants' Repudiation of the Option to Purchase

An option is a unilateral contract which establishes an irrevocable offer and is supported by consideration. Butler v. Richardson, 74 R.I. 344, 350, 60 A.2d 718, 722 (1948). An option without consideration is simply an open-ended offer which may be revoked at any time before acceptance. Humble Oil & Ref. Co. v. Lennon, 94 R.I. 509, 516, 182 A.2d 306, 310 (1962). The determination of whether Plaintiff's breach of the Lease renders the Option void depends on whether the Option is independent or whether the Option is conditioned upon compliance with the Lease. 49 Am. Jur. 2d Landlord and Tenant § 338 (2013) (citing In re E. Sys., Inc., 105 B.R. 219, 230 (Bankr. S.D.N.Y. 1989)).

The general rule of construction regarding options in leases is that an option contained in a lease is an integral part of the whole contract. Id.; but see Pettit v. Tourison, 283 Pa. 529, 531-32, 129 A. 587, 588 (1925). Although the Option to Purchase and the Lease are contained in the same document, they are not necessarily considered as one. See Harmann v. French, 74 Wis. 2d 668, 672, 247 N.W.2d 707, 710 (1976); see also Levin v. Nedelman, 142 N.J. Eq. 769, 770-71, 61 A.2d 76, 77 (1948) (finding the letting and the option were two separate and distinct contractual projects). When construing the whole contract, the intent of the parties as to whether or not the documents are to be considered as one or distinct is the primary consideration. See

Lennon, 94 R.I. at 513-14, 182 A.2d at 309. In other words, "[t]he determining factor in deciding if an option is rendered void due to a [breach of] a lease is not whether the documents are construed as a single transaction or as separate documents, but, more important, whether the parties, through their expression of intention, have chosen to make the exercise of the option conditional upon compliance with the terms of the lease." 49 Am. Jur. 2d Landlord and Tenant § 338 (internal citation omitted). In order to determine the parties' intent, this Court must examine the language of the whole contract and the surrounding circumstances. Samos v. 43 E. Realty Corp., 811 A.2d 642, 643 (R.I. 2002).

In Lennon, our Supreme Court sought the intention of the parties from the language of the contract and determined that the option to purchase was not intended to be independent of, or severable from, the lease. 94 R.I. at 513-14, 182 A.2d at 309. In pertinent part, the Lease provided that the "Lessee shall have the right and option to purchase the property hereinbefore described, for the sum of Fifteen thousand ($15,000) Dollars at any time during the term hereof." 94 R.I. at 509, 182 A.2d at 308. In addition, our Supreme Court found that "the lessee's agreement to pay rent was sufficient consideration to support the option to purchase . . . ." Id.

The case before this Court is distinguishable from Lennon. Here, the intention of the parties, derived from the language of the contract and the surrounding circumstances, was that the Lease and the Option to Purchase were two distinct contractual obligations. Although the Option and the Lease have commonality, the contractual obligations are distinct. See 49 Am. Jur. 2d Landlord and Tenant § 296. Neither the Option nor the Lease made compliance with the Lease a condition of the Option. See 43 E. Realty Corp., 811 A.2d at 643. In fact, the Option did not become binding until the consideration was paid, which was in excess of a year after the Lease was executed. See Richardson, 74 R.I. at 350, 60 A.2d at 722; contra Lennon, 94 R.I. at

513-14, 182 A.2d at 309. In addition, the Option expired on September 1, 2011, a full two months prior to the expiration of the Lease. See Joint Ex. 1, ¶ 26. Thus, although the Lease and the Option to Purchase are contained within the same document, this Court finds that they are two distinct contractual obligations with separate consideration and differing terms. See French, 74 Wis. 2d at 672, 247 N.W.2d at 710; Nedelman, 142 N.J. Eq. at 770-71, 61 A.2d at 77; Tourison, 283 Pa. at 531-32, 129 A. at 588; see also 49 Am. Jur. 2d Landlord and Tenant § 338 (an option to purchase and a lease may be considered independent or of a dual nature). The fact that the Lease and the Option to Purchase are distinct contractual obligations is exemplified by the undisputed testimony that Mr. Kyriakides told Mr. Sandonato that he would replace the Martini Bar if the Option was not exercised and that the parties continued to abide by the Lease for a year and four months after Mr. Sandonato learned of the Martini Bar's removal.

Based upon the facts of this case, it is incongruous to hold that the parties intended that the alterations in question constituted a breach of the Option when Plaintiff could have exercised the Option and been subject to the condition of the property as so altered. See 43 E. Realty Corp., 811 A.2d at 643. Here, the intention of the parties, expressed through the language of the Lease and the Option, as well as their actions, was to consider the Option and the Lease as two distinct contracts, as it related to the alterations in question. See Lennon, 94 R.I. at 513-14, 182 A.2d at 309; 49 Am. Jur. 2d Landlord and Tenant § 338. Consequently, this Court finds that Plaintiff's alteration of the premises based upon the facts of this case did not justify repudiation of the Option.

C

Plaintiff's Entitlement to Damages as a Result of Defendants' Repudiation

This Court must next determine whether Plaintiff is entitled to damages for Defendants' repudiation of the Option. Primarily, it should be that Plaintiff never formerly exercised the Option. See 60 Am. Jur. 3d Proof of Facts § 304 (2001) (stating that "the fact that optionor gave notice that it would not comply with the terms of the contract before the time for exercising the option expired, does not excuse the optionee from giving proper notice of his election to exercise the option").

The record reflects that Plaintiff, through its attorney, Mr. Martland, requested an extension of the Option on August 19, 2011. (Joint Ex. 11). Moreover, Mr. Martland testified that Plaintiff did not have bank financing and that he advised his client not to exercise the Option. Id. It is also important to note that the Option required that the closing occur within sixty days and that "time was of the essence." (Joint Ex. 1, ¶ 26(a)).

On August 22, 2011, Defendants refused to extend the Option and reiterated its position that the Plaintiff's rights under the Option were extinguished because of Plaintiff's breach of the Lease. (Joint Ex. 12). Thereafter, on September 1, 2011—the date the Option was to expire—a flurry of emails were exchanged between the parties' attorneys beginning with an email at 4:20 p.m. from Mr. Martland stating that his client was "prepared to exercise the option to purchase by today; however, because of your client's position, it would be futile." (Joint Ex. 15). Defendants' attorney wrote back at 6:44 p.m. indicating that he was "dumbfounded" by Plaintiff's assertion that it was prepared to exercise the option because it was inconsistent with Mr. Martland's representation twelve days prior that Plaintiff did not have the requisite financing. Id. Subsequently, the following exchange occurred between the parties' attorneys:

> "7:13 P.M., from Plaintiff's attorney: "Joe, My client requested the extension. I met with you in an effort to obtain the extension and your client refused. My client then had the decision to make to either exercise the option or not; however, your client has declared the lease agreement to be in 'irretrievable default' and . . . declared that my client 'no longer has an option to purchase.' Again, my client is prepared to exercise the option to purchase but given your client's position, we apparently have to go to Superior Court to enforce this right. Thank you for your reply. I remain, Dave
>
> "7:23 P.M., from Defendants' attorney: "David, the solution to the dispute over the option is simple. If your clients are prepared to do so, send me your client's notice of its election to exercise the option by midnight tonight. It's that simple. Joe
>
> "7:24 P.M., from Defendants' attorney, "Joe, are you saying your client will honor the option. Dave
>
> "8:30 P.M., from Plaintiff's attorney: "David, if your client exercises the option, I will present it to him. If the lease is valid, he would have no choice. Joe" Id.

Even though Defendants' attorney invited Plaintiff to exercise the Option, Plaintiff's attorney never responded, and the Option to Purchase was not exercised.

Despite Defendants' express statement that Plaintiff's rights under the Option were extinguished, it is well settled that the doctrine of anticipatory repudiation has no application to unilateral contracts. See Winegar v. Earle, 108 R.I. 464, 470, 276 A.2d 468, 471 (1971); Smyth v. United States, 302 U.S. 329, 356 (1937)); see also Restatement (First) Contracts § 318 (1937); 23 Williston, Contracts § 63:60 (4th ed. 2000). Here, the Option was supported by consideration making it a unilateral contract. Richardson, 74 R.I. at 350, 60 A.2d at 722. "No right of action arises from the repudiation before maturity of a unilateral contract." Gen. Am. Tank Car Corp. v. Goree, 296 F. 32, 36 (4th Cir. 1924). Therefore, Defendants' so-called repudiation of the Option did not excuse the Plaintiff from giving notice of election to exercise the Option to Purchase the property because until the Option was accepted, no contract of purchase existed and

the Defendants were under no duty to convey the property. See Unatin 7-Up Co. v. Solomon, 350 Pa. 632, 637, 39 A.2d 835, 837 (1944); Kotcher v. Edelblute, 250 N.Y. 178, 184, 154 N.E. 897, 897 (1928) (finding that "[e]ven repudiation of the option by the [optionor] does not prevent the [optionee] from exercising his election"). The purpose of the notice requirement was to give the Defendants time to fulfill its offer and to function as evidence that Plaintiff had exercised the Option and accepted Defendants' offer. See Catawba Athletics, Inc. v. Newton Car Wash, Inc., 281 S.E.2d 676, 679-80 (N.C. Ct. App. 1981).

In Newton Car Wash, Inc., the landlord had told the tenant that it had no intention of honoring the option, but the Court of Appeals of North Carolina held that the tenant's failure to exercise the option was fatal to an action on the contract. 281 S.E.2d at 679. Specifically, the Court stated that "[t]he fact that the optionor, before the time for exercising the option expired, gave notice that it would not comply with its contract will not excuse the optionee from giving proper notice of his election to purchase and offering to comply with the terms of the option." Id. Moreover, it was found in litigation involving an option deed, that despite optionor's repudiation of an option, "[optionee] must, under the familiar rule of contracts relating to offer and acceptance, in order to establish any equitable contractual relations with the [optionor], indicate to [optionor] definitely an acceptance and willingness to proceed with the contemplated transaction." Russell v. Hill, 237 Ark. 712 (1964) (internal citation omitted); see also 77 Am. Jur. 2d Vendor and Purchaser § 40 at 220 (2013) (stating that no contract to purchase exists, and the optionor is under no obligation to convey the property until the option is accepted in accordance with the terms of the original contract).

Furthermore, "there is no contract if the election is not made before the expiration of the time, and equity, finding no contract to use its discretion upon, cannot be concerned with the

element of time, which presupposes an existing contract." Neeson v. Smith, 47 Wash. 386, 392-93, 92 P. 131, 133 (1907) (internal citations omitted). Smith involved an action for specific performance of a contract to reconvey land and for damages. 47 Wash. at 392-93, 92 P. at 133. The court found that "there can be no relief against a failure to exercise an option after the day named for its expiration, for an option is no more than an offer to sell which the offerer is bound to keep open during the time set, but which expires with that time, leaving nothing for equity to operate upon." Id.

However, the timely institution of an action for specific performance by the optionee before the expiration of the option period would cure the optionee's failure to make a timely notice of election. See Asbury v. Cochran, 243 Ala. 281, 283, 9 So. 2d 887, 888 (1942); Hafemann v. Korinek, 266 Wis. 450, 459-60 (1954) (finding that an action for specific performance, in order to be effective to cure a defective notice, must have been instituted before the expiration of the option). "The optionee must take some action to demand performance before the option expires. Once the contractual period for performance is over, nothing the optionee does will revive the option." Lucente v. International Business Machines Corp., 146 F. Supp. 2d 298, 309 (2001) (citing Kaplan v. Lippman, 552 N.E.2d 151 (1990)).

Here, Plaintiff's right to damages was conditioned upon it exercising the Option. See Newton Car Wash, Inc., 281 S.E.2d at 679. Based on the facts presented, this Court finds that Plaintiff's failure to exercise the Option on or before September 1, 2011 prohibits Plaintiff from now claiming damages for Defendants' so-called repudiation. See Smith, 47 Wash. at 392-93, 92 P. at 133; see also Korinek, 266 Wis. at 459-60. Therefore, Plaintiff's failure to exercise the Option resulted in no contract to purchase being formed; thus, Defendants' repudiation is immaterial. See Solomon, 350 Pa. at 637, 39 A.2d at 837; 60 Am. Jur. 3d Proof of Facts § 304;

77 Am. Jur. 2d Vendor and Purchaser § 40 at 220. To hold otherwise would allow Plaintiff to position itself so as to litigate enforcement of the Option without being bound by its terms. This is especially problematic considering that Plaintiff withdrew its demand for specific performance on the eve of trial due to alleged structural problems with the pilings supporting the wharf below the building, and that the evidence before this Court indicates that the value of the property may have been less than the purchase price contained in the Option.

Furthermore, even if this Court were to hold that it was not necessary for Plaintiff to exercise the Option in order to be entitled to damages, Plaintiff's claim must fail as Plaintiff did not prove that it was ready, willing, and able to satisfy the terms of the Option to Purchase. See Bucklin v. Morelli, 912 A.2d 931, 936 (R.I. 2007); Griffin v. Zapata, 570 A.2d 659, 662 (R.I. 1990) (citing Jakober v. E.M. Loew's Capitol Theatre, Inc., 107 R.I. 104, 114, 265 A.2d 429, 435 (1970)); Richardson, 74 R.I. at 351, 60 A.2d at 723. It is uncontested that Plaintiff did not have bank financing as of September 1, 2011, in order to purchase the property. No factual basis has been provided to establish that Plaintiff was ready, willing, and able to perform its obligations contained in the Option to Purchase. The only testimony remotely related to Plaintiff's ability to satisfy the financing requirements is the testimony of Mr. Kyriakides, who testified that he had a family friend from Connecticut who was willing to lend him 1.5 million dollars, and a friend from Jamestown, Rhode Island was willing to lend him one million dollars. However, there is no testimony regarding the terms of these offers or whether or not these purported lenders would accept the terms of the Option; especially considering that the Option provided that Defendants would have a first mortgage for 1.4 million dollars on the premises, the personalty, and the liquor license. (Joint Ex. 1, ¶ 26). Furthermore, there is no testimony as to whether or not each potential lender knew that the other lender would be involved. This

testimony, standing alone, does not come close to establishing that Plaintiff was ready, willing, and able to satisfy the terms of the Option to Purchase. See Morelli, 912 A.2d at 936. Thus, even if Plaintiff was not required to exercise its Option, Plaintiff's failure to prove that it was ready, willing, and able to satisfy the terms of the Option causes its claim to fail. See Richardson, 74 R.I. at 351, 60 A.2d at 723.[11]

D

Plaintiff's Breach of the Lease by Failing to Comply with Its Obligation at the Expiration of the Lease

Defendants claim that Plaintiff breached the Lease by failing to comply with various contractual obligations imposed at the expiration of the term of the Lease. Each claim will be discussed separately.

First, Defendants claim that failure to return the liquor license constituted a breach. The Lease clearly mandated that the tenant shall "peaceably yield" the liquor license at the expiration

[11] Even if the Plaintiff established that the Defendants were liable to it for repudiating the Option, Plaintiff failed to prove it was entitled to reliance damages. Reliance damages are an alternative form of damages when the non-breaching party cannot show loss of profits. Brennan v. Carvel Corp., 929 F.2d 801, 811 (1st Cir. 1991); Dolmatch Grp., Ltd. v. United States, 40 Fed. Cl. 431, 439 (Fed. Cl. 1998) (citing Restatement (Second) of Contracts § 349 (1979)). They are meant to compensate the non-breaching party for its reliance interest associated with a contractual obligation. See Doering Equip. Co. v. John Deere Co., 61 Mass. App. Ct. 850, 855, 815 N.E.2d 234, 239 (2004); Am. Jur. 2d Damages § 63. In order to be eligible for reimbursement, the expenses must be incurred after the contract has been formed. See DPJ Co. Ltd. P'ship v. F.D.I.C., 30 F.3d 247, 250 (1st Cir. 1994); Farnsworth, Contracts § 12.16 at 928 n.2. (2d ed. 1990); Am. Jur. 2d Damages § 51. In this case, the Plaintiff testified that most of the expenses were incurred at the beginning of the Lease. The Option did not become binding until consideration was paid, which was January 1, 2011, thirteen months after the Lease was signed. See F.D.I.C., 30 F.3d at 250. In addition, Defendant's repudiation occurred on July 31, 2011. At best, Defendants would be liable for those expenses incurred between January 1, 2011 and July 31, 2011, which it was not otherwise obligated to pay pursuant to the Lease. Furthermore, Plaintiff operated the restaurant for a year and ten months. Plaintiff provided no evidence of the income, loss, or profit. See Carvel Corp., 929 F.2d at 811. Even if Plaintiff were able to prove that Defendants were liable, it appears that reliance damages are an inappropriate measure of damages in the case before this Court.

of the Lease back to the landlord. The Lease also required that Plaintiff execute the necessary documents, in advance, to effectuate the transfer at the expiration of the term. (Joint Ex. 1, ¶ 7.3). Plaintiff nullified said documents by letter to the City of Newport dated March 28, 2012—see Defs.' Ex. E—thus, thwarting the transfer back to Defendant. There is no doubt that Plaintiff's failure to transfer the liquor license at the expiration of the Lease constituted a material breach of the Lease. Failure to transfer the license is in direct violation of the clear and unambiguous language of the Lease.

There is no question that the liquor license was an essential part of the agreement between the parties. In fact, Plaintiff had the ability to terminate the Lease if the City of Newport failed to transfer the liquor license to it at the beginning of the Lease. (Joint Ex. 1, ¶¶ 2.2, 7.3). In addition, Section 7.3 of the Lease states, "tenant acknowledges that the liquor license is a valuable asset of the leased premises and tenant does hereby agree that it shall do nothing . . . to cause a diminution in the value of such license." It is clear that Plaintiff's failure to transfer the liquor license back to Defendants constituted a material breach of the Lease.

Defendants also contend that Plaintiff breached the Lease by failing to leave the premises in good order and condition, excluding reasonable wear and tear, at the expiration of the Lease. This includes failure to make necessary repairs to the roof and other structural systems. See Joint Ex. 1, ¶¶ 2, 5.3 and 5.4. Mr. Sandonato testified that when he regained possession of the premises, it was "filthy" and required extensive cleaning. See Defs.' Ex. J, 1 through 15, depicting the condition of the premises. He testified that Plaintiff failed to keep the premises in sufficient repair. In particular, he claimed the failure to keep the roof in good repair resulted in numerous leaks causing damage to the interior of the building. He also testified that the graffiti on the walls of the restaurant depicted in Defendants' Exhibit I bled through the paint requiring

numerous coats. In addition, Mr. Sandonato testified that doors between the kitchen and the various dining rooms had holes cut in them, presumably to provide an employee using the door with the ability to see oncoming employees on the other side. See Defs.' Exs. J and K, depictions of the damage to the premises; see also Defs.' Exs. P, Q, and T, documentation and itemization of the amounts paid.

Mr. Sandonato's testimony was corroborated by William Mackin. Mr. Mackin testified he was hired by Mr. Sandonato to assess the condition of the premises at the expiration of the Lease with Plaintiff. Mr. Mackin detailed the condition of the property and equipment that needed cleaning, repair, or replacement.

Mr. Kyriakides presented 247 photographs, which he said depicted the condition of the property at the expiration of the Lease. (Pl.'s Ex. 3). Although the photographs appear professionally done, upon close examination and in comparison to Defendants' photographic evidence, much of what Defendants complained of was visible. See id. This was corroborated by Mr. Mackin, who testified that although it appeared that the photos were taken with "a lot of light," dirt, grease, and damage were still visible.

Although Mr. Kyriakides and Mr. Holder testified generally about the poor condition of the premises when Plaintiff took possession, the Lease states that the tenant takes the property "AS IS" and acknowledges that the "premises are in good order and condition and sufficient for the uses intended by the tenant." (Joint Ex. 1, ¶ 5.1). Little or no testimony was offered by the Plaintiff to refute Defendants' evidence relating to the condition of the premises at the expiration of the Lease.

The only evidence offered by Plaintiff to refute their testimony was the pictures reflected in Plaintiff's Exhibit 3 and the testimony of Mr. Holder, indicating that he primed and painted

the walls prior to vacating the premises. As stated above, careful examination of Plaintiff's Exhibit 3, in comparison with Defendants' Exhibit J, reveal the actual condition of the premises, which is consistent with Sandonato and Mackin's testimony.

In addition, no evidence was presented to counter Mr. Mackin and Mr. Sandonato's testimony regarding the leaks in the roof and the resulting damage. See Defs.' Ex. K. Moreover, no evidence was presented to counter Mr. Mackin and Mr. Sandonato's testimony that the "graffiti" leaked through the paint requiring additional coats of paint, and that the equipment was damaged or broken.

This Court finds that Mr. Sandonato and Mr. Mackin were credible witnesses and that Defendants proved, by a preponderance of the evidence, that Plaintiff breached the Lease by failing to leave the premises in good order and condition and failing to make the necessary repairs at the expiration of the term of the Lease.

E

Plaintiff's Breach of the Lease by Reupholstering the Window Cornices

Plaintiff reupholstered various window cornices when it took possession of the premises. Defendants claim that the cornices were reupholstered with a lesser quality fabric and seek damages.

Defendants called Alan Kaplan of Sun Ray Interiors to testify regarding the cost to reupholster the cornices. Mr. Kaplan testified that it would cost $9000 to reupholster the cornices with the same quality fabric that existed when Plaintiff took possession. On cross-examination, Mr. Kaplan admitted that he never saw the original cornices and that he was estimating the value of the material. He also testified that the cost of the original fabric could not be determined by looking at the photos. See Defs.' Ex. R.

This Court finds that Defendants failed to establish that the reupholstering of the cornices breached the Lease. Even if Defendants did prove there was a breach, Defendants failed to prove that it suffered any damages associated with the alleged breach. Mr. Kaplan's testimony was based on conjecture and failed to establish the requisite foundation necessary to award Defendants damages on this issue.

F

Damages

"'[I]t is well settled that a court may award damages for breach of contract to place the injured party in as good a position as if the parties fully performed the contract.'" Sophie F. Bronowiski Mulligan Irrevocable Trust v. Bridges, 44 A.3d 116, 120 (R.I. 2012) (quoting Riley v. St. Germain, 723 A.2d 1120, 1122 (R.I. 1999)). "'The amount of damages sustained from a breach of contract must be proven with a reasonable degree of certainty, and the [party] must establish reasonably precise figures and cannot rely upon speculation.'" Sea Fare's American Cafe, Inc. v. Brick Market Place Associates, 787 A.2d 472, 478 (R.I. 2001) (quoting National Chain Co. v. Campbell, 487 A.2d 132, 134–35 (R.I. 1985)). "However, '[parties] will not be denied recovery merely because the damages . . . are difficult to ascertain, as long as they prove damages with reasonable certainty.'" Id. (quoting National Chain Co., 487 A.2d at 135).

It is a fundamental principle of contract law, and the settled law of this state, that "clear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985). "'[T]he trial justice clearly ha[s] an obligation to examine and consider the testimony of each expert witness on the issue of damages and to accord that testimony only such weight as the evidence, considered as a whole, and the inferences drawn

therefrom, reasonably warrant.'" Blue Ribbon Beef Co., Inc. v. Napolitano, 696 A.2d 1225, 1228 (R.I. 1997) (quoting White v. LeClerc, 444 A.2d 847, 849 (R.I. 1982)); see also Warwick Musical Theatre, Inc. v. State, 525 A.2d 905, 909 (R.I. 1987) (finding that a trial justice does not err by engaging in such a selective evaluation and application of expert evidence to the facts presented during a trial).

Moreover, "[u]nder Rhode Island law a party claiming injury that is due to breach of contract . . . has a duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages." Tomaino v. Concord Oil of Newport, Inc., 709 A.2d 1016, 1026-27 (R.I. 1998) (citing Bibby's Refrigeration, Heating & Air Conditioning, Inc. v. Salisbury, 603 A.2d 726, 729 (R.I. 1992)). "This rule prevents the injured party from sitting silent while the damages accumulate." Id. (citing Salisbury, 603 A.2d at 729). "It is important to differentiate between the legal duty to mitigate and actual success in mitigation." Id. The law mandates reasonable efforts and ordinary care in the circumstances. See Fleet National Bank v. Anchor Media Television, Inc., 45 F.3d 546, 561 (1st Cir. 1995). Moreover, the duty to mitigate does not create liability for failure to do so; however, the party is prohibited from recovering the amount of damages the party could have reasonably avoided. Bibby's, 603 A.2d at 729. However, the burden of proving that a party failed to mitigate is placed on the opposing party. Id.

1

Martini Bar

This Court has determined that Plaintiff's removal of the Martini Bar constituted a material breach of the Lease. Mr. Sandonato testified in great detail regarding the construction of the Martini Bar and its various components. Mr. Prete testified at length regarding his experience in constructing commercial and residential bars such as the Martini Bar in question.

He also testified regarding his familiarity with the Martini Bar as he witnessed its construction. Mr. Prete testified that the net cost to replace the Martini Bar and components (minus three beer coolers which remained at the property) was $75,700.

The Court finds that Mr. Sandonato's testimony regarding the Martini Bar was credible. The Court also found Mr. Prete to be a credible witness with considerable experience in the area of construction. Therefore, this Court awards damages in the amount of $75,700 as it relates to the removal of the Martini Bar.

2

Damage to Property and Equipment

The Court has determined that Plaintiff breached the Lease by failing to leave the premises and equipment in good order and repair. Mr. Sandonato and Mr. Mackin testified regarding the condition of the premises and equipment at the expiration of the Lease. Mr. Sandonato testified regarding the cost to repair, replace, or clean the premises. See Defs.' Ex. Q. He also testified regarding the cost to replace the doors. See Defs.' Ex. T. The nature of the expenses paid was not to remedy normal wear and tear. See Defs.' Ex. Q. Rather, they were to remedy broken or damaged equipment or the faulty condition of the premises, which was a result of Plaintiff's breached contractual obligation to keep the premises in good repair.

This Court finds that the expenditures reflected in Defendants' Exhibits P, Q and T, as testified to by Mr. Sandonato, were fair, reasonable, and directly necessitated by Plaintiff's breach of its contractual obligations pursuant to the Lease, and awards Defendants damages in the amount of $34,785.06.[12]

[12] The expenditures reflected in Defendants' Exhibits P, Q, and T actually amount to $34,809.04. However, Mr. Sandonato testified that the amount of $23.98 for replacement of missing wastebaskets was included by mistake.

3

Failure to Transfer the Liquor License

This Court has determined that Plaintiff's failure to transfer the liquor license at the expiration of the Lease constituted a breach. Defendants seek one year's rental income as a result of Plaintiff's breach. See Defs.' Post-trial Mem.

Mr. Sandonato testified that after the Plaintiff vacated the premises, he unsuccessfully attempted to lease the restaurant. He testified that he was unable to lease the restaurant because it did not have a liquor license. He operated the restaurant himself without the liquor license beginning in June of 2012. He testified that the restaurant lost money, and as a result, he closed the restaurant on September 30, 2012. The restaurant remained unoccupied without a liquor license until May of 2013.

Defendants called Ronald McInerney as an expert in the field of real estate. Mr. McInerney performed a fair market rental analysis for the property in question. He testified that he inspected the property in March of 2012, and his rental value was for the period beginning on March 1, 2012 forward. Mr. McInerney opined that the restaurant was not rentable on March 1, 2012. He based his opinion on the fact that the restaurant did not have a liquor license and the pending lawsuit seeking possession and ownership through specific performance of the Option to Purchase. This Court found Mr. McInerney's testimony regarding the rentability of the property to be reliable, credible, and supported by the evidence.

Mr. McInerney also offered his opinion regarding the fair rental value of the restaurant with the liquor license, but without the pending lawsuit. His opinion was that the rental value as of March 1, 2012 was $20,800 per month, triple net. He used nine comparable properties to formulate his opinion. Upon cross-examination, Mr. McInerney admitted that many of the

comparable properties were not restaurants and he was unsure of the specific details of the ones that were, such as the type of liquor license and whether or not they had off-street parking. He also considered the Lease with Plaintiff's predecessor, Aquidneck Hospitality Group, LLC, which only lasted a few months before the lessee vacated the property. The Court finds that Mr. McInerney's opinion regarding the rental value of the premises was not based on sufficiently reliable evidence. See Warwick Musical Theatre, 525 A.2d at 909.

In rebuttal, Plaintiff called Nathan Godfrey as an expert in the field of real estate appraisal. Mr. Godfrey performed his appraisal a month prior to trial and did a current rental analysis based on 2013 data. (Defs.' Ex. W). He opined that the restaurant, as of the date of trial and without a liquor license, would generate $138,927 per annum or $11,577.25 per month, triple net. Id. Importantly, Mr. Godfrey was unaware of Plaintiff's claim of ownership and possession associated with the within lawsuit and did not consider that fact in his analysis. The Court believes that Mr. Godfrey's opinion is not based upon sufficiently reliable evidence in that it was based upon 2013 data, and did not consider the ramifications of Plaintiff's lawsuit claiming ownership and possession through specific performance as it related to the rentability of the premises.

As stated above, the Court found Mr. McInerney's testimony reliable concerning the rentability of the premises. Thus, the Court finds that the premises were not rentable because of Plaintiff's claim for ownership and possession against the property as well as the fact that Defendants did not possess a liquor license. In addition, the Court finds that the best evidence relating to the rental value of the property is the Lease entered into between Plaintiff and Defendants. See Riley v. Stafford, 896 A.2d 701, 703 (R.I. 2006) (finding that trial court's reliance on tenant's monthly rental payments of $600 to prior landlord in determining back rent

owed by tenant to current landlord was not clearly erroneous); see also Ucci v. Mancini, 120 R.I. 352, 387 A.2d 1056 (1978) (finding stipulated rent in a lease is a factor to be considered in determining reasonable rental value of property). When Plaintiff vacated the premises, it was paying $17,000 per month or $204,000 per annum, triple net. The taxes and insurance cost for the year following March 1, 2012 are reflected in Defendants' Exhibits U and V. The tax payments payable between March 1, 2012 and February 28, 2013 total $30,304. The insurance premiums payable over the same term total $24,345. This Court finds that the damages associated with Plaintiff's failure to return the liquor license consisting of lost rent, including taxes and insurance, total $258,549.

4

Plaintiff's Failure to Vacate the Premises at the Expiration of the Lease

It is uncontested that Plaintiff did not vacate the premises until after the expiration of the terms of the Lease. Paragraph 2 of the Lease sets the expiration at 11:59 p.m. on October 31, 2011. See Joint Ex. 1, ¶ 2. Plaintiff did not vacate the premises until November 30, 2011. Paragraph 14 of the Lease requires that Plaintiff pay double the amount of monthly rent if Plaintiff remains in possession after the expiration of the term. See Joint Ex. 1, ¶ 14. However, an apparent inconsistency appears in Paragraph 3 entitled "Base Rent." See Joint Ex. 1, ¶ 3. Paragraph 3 established the base rent for the second part of the Lease through November 30, 2011, not October 31, 2011. See id. The rent for that period is specified at $17,000. Thus, Defendants are entitled to $17,000 unpaid rent.

The Lease also makes Plaintiff liable for payment of real estate taxes while in possession of the property. See Joint Ex. 1, ¶ 4.1(a). It is undisputed that Plaintiff did not pay the taxes for the months of October and November 2011. The undisputed evidence establishes that amount to

be $6234. Thus, the amount owed by Plaintiff for taxes and unpaid rent totals $23, 234.

IV

Conclusion

For all the reasons set forth herein, this Court finds for Defendants and against Plaintiff in the amount of $392,268. The personal guarantee signed by Petro Kyriakides and Charalambos Kyriakides, and included in the Lease, renders them personally liable to Defendants. Counsel for the prevailing party shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	The Pier of Newport, LLC. v. N.A.J. Associates, L.L.C., et al.
CASE NO:	NC 11-0502
COURT:	Newport County Superior Court
DATE DECISION FILED:	February 11, 2014
JUSTICE/MAGISTRATE:	Van Couyghen, J.
ATTORNEYS:	
For Plaintiff:	Robert M. Silva, Esq.; David P. Martland, Esq.
For Defendant:	Joseph R. Palumbo, Esq.; Kevin Vendituoli, Esq.