STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: September 12, 2013)

CUMBERLAND FARMS, INC., both in its corporate capacity and its capacity as Trustee of the DJS Corp. Realty Trust	:	
	:	**C.A. No. WD-2012-0596**
v.	:	
KIMON DAFOULAS	:	

DECISION

K. RODGERS, J. This matter is before the Court on Plaintiff Cumberland Farms, Inc.'s (Plaintiff) Complaint for Possession/Ejectment against Defendant Kimon Dafoulas (Defendant), which was originally filed in the Fourth Division District Court. Following entry by the District Court of a Final Judgment in favor of Plaintiff, Defendant appealed the matter to this Court for a de novo trial on the merits pursuant to G.L. 1956 § 9-12-10.1.

This Court conducted a bench trial in this matter on February 19, 2013. For the reasons set forth herein, this Court finds that Defendant has breached the terms of the parties' commercial lease and Plaintiff is entitled to immediate possession of the leased premises as well as monetary damages based on Defendant's breach. Accordingly, judgment shall enter for Plaintiff.

I

Facts and Travel

Having reviewed the evidence presented by both parties at a jury-waived trial, the Court makes the following findings of fact, derived largely from the parties' Joint Trial Exhibits (Joint Exs.) including Ex. J-1, which is the parties' Joint Statement of Undisputed Facts.

A

Ownership of the Subject Property

The commercial property at the center of the instant controversy is a one-level, two-unit strip mall located at 1175 Main Street in Richmond, Rhode Island (1175 Main Street or the Subject Property). Joint Ex. J-1, ¶ 3. One of the two units at 1175 Main Street—Unit One—is home to a gas station and convenience store operated by Plaintiff. Joint Ex. 1, ¶ 3. The other unit—Unit Two—is home to a pizzeria known as "Town Pizza II," which is operated by ALKOST, LLC. Id. ¶¶ 2-3. Defendant is the managing member of ALKOST, LLC. Id. ¶ 2.

By Trust Agreement dated March 5, 1996, Cumberland Farms, Inc., in its corporate capacity (CFI), created the DJS Corp. Realty Trust, and CFI was named and appointed therein as Trustee of the DJS Corp. Realty Trust (CFI-Trustee). Joint Ex. J-10. The Trust Agreement prohibits the Trust Property from being transferred, sold or conveyed without the signature of the Escrow Agent on a deed or other instrument of conveyance.[1] Id. § 3.1. The Trust Agreement further requires that, upon termination of the DJS Corp. Realty Trust, the Trustee shall transfer and convey Trust Property, subject to any leases, mortgages, contracts or encumbrances, but allowing that "the Trustee may retain such portion of the Trust Property as in its opinion reasonably necessary to discharge any expense or liability." Joint Ex. J-1, ¶ 29; Joint Ex. J-10, § 8.2.

Prior to March 1996, CFI owned 1175 Main Street. Joint Ex. J-1, ¶ 24. On March 5, 1996, in conjunction with the execution of the Trust Agreement, CFI executed a Quitclaim Deed transferring "four separate parcels constituting the real estate on which the Property is located" to

[1] Although not set forth in the Trust Agreement, G.L. 1956 § 34-4-27 requires the recording of the trust agreement or a memorandum of trust when there is a transfer of real property held in trust.

itself as CFI-Trustee. Joint Ex. J-1, ¶ 25; Joint Ex. J-4. The four parcels referred to therein included three so-called Lynch parcels and one so-called Woodmansee parcel, which parcels in turn refer to the parties who originally conveyed the parcels to CFI. Joint Ex. 1, ¶ 25. Unit Two, in which Defendant operates Town Pizza II, is located on the Woodmansee parcel. Id. ¶ 26.

By Quitclaim Deed dated June 11, 2003, and recorded in the Richmond Land Evidence records on September 12, 2003, CFI-Trustee transferred 1175 Main Street back to CFI. Id. ¶ 27; Joint Ex. J-5. The 2003 Quitclaim Deed included a page entitled "State Street Bank & Trust Company Escrow Agent," and bore the signature of Paul D. Allen as State Street Bank & Trust Company's Attorney-in-Fact. Joint Ex. J-1, ¶ 28; Joint Ex. J-5; see also Joint Ex. J-10, § 1.1 (identifying State Street Bank & Trust Company as Escrow Agent). The DJS Corp. Realty Trust Agreement was not recorded at that time, nor was a memorandum of trust.

As compared to the March 1996 Quitclaim Deed, the 2003 conveyance back to CFI failed to include a metes and bounds description that reflected the Woodmansee parcel. Joint Ex. J-5; cf. Joint Ex. J-4. However, the 2003 Quitclaim Deed did expressly convey "the real property located at 1175 Main Street, Richmond, RI, and more fully described in Exhibit 'A' attached hereto and made a part hereof," and Exhibit A attached to the 2003 Quitclaim Deed refers to the conveyed property as "being the same Premises conveyed . . . in Book 105, Page 506," which page reference is Exhibit A to the 1996 Quitclaim Deed that includes the metes and bounds description of the Woodmansee parcel. Joint Ex. J-5; cf. Joint Ex. J-4.

The DJS Corp. Realty Trust Agreement was terminated on June 30, 2007. Joint Ex. J-1, ¶ 30; Joint Ex. J-11. On October 26, 2012, a Confirmatory Trustee's Deed was filed in the Richmond Land Evidence Records that sought to effectuate the transfer of the Woodmansee parcel from CFI-Trustee back to CFI. Pl.'s Ex. 1 (stating that the Confirmatory Trustee's Deed

"is intended to confirm and correct a prior conveyance" in which the trustee had "inadvertently omitted from the Exhibit A attached thereto the legal description of the parcel hereinafter described as 'FOURTH TRACT'"). Exhibit A attached to the Confirmatory Trustee's Deed included the metes and bounds description of the Woodmansee parcel along with the three Lynch parcels. Pl.'s Ex. 1. On that same day, a Trustees' Affidavit and Certificate Pursuant to § 34-4-27 was also executed and recorded in the Richmond Land Evidence Records.

B

Defendant's Lease

Defendant came to operate his business in Unit Two pursuant to the terms and conditions of a commercial lease agreement dated November 2, 2005 (the Lease). Joint Ex. J-1, ¶ 4; Joint Ex. J-6. The Lease identified the landlord as "Cumberland Farms, Inc., Trustee of DJS Corp. Realty Trust, u/d/t dated March 5, 1996." Joint Ex. J-1, ¶ 5; Joint Ex. J-6. The Lease was for a term of five years beginning January 1, 2006 and ending December 31, 2010, and provided Defendant with specific year-to-year terms for payment of rent. Joint Ex. J-6. The parties subsequently entered into an Extension and Amendment of Lease dated September 17, 2010 (the Extension), which identified the landlord as "Cumberland Farms, Inc., F/K/A a Trustee of DJS Corp, [sic] Realty Trust." Joint Ex. J-1, ¶¶ 6-7; Joint Ex. J-7. That Extension extended the Lease for an additional five years beginning January 1, 2011 and ending December 31, 2015. Joint Ex. J-7. Both the Lease and the Extension identified Defendant as the tenant. Joint Ex. J-1, ¶¶ 5, 7; Joint Exs. J-6, J-7.

The Extension contains three sections. Section 1 of the Extension provides the specific terms for the payment of rent during the term of the Extension. See Joint Ex. J-7. Additionally, that section includes an option for a second five-year extension "upon the same terms and

conditions except that rent during such option periods shall be provided for in Section 3" of the Lease. Id. Section 2 of the Extension explicitly replaces the notice provisions found in Section 26 of the Lease, and sets forth the following requirements for notices issued to Defendant incidental to the Lease or occupation of the Subject Property:

> "All notices . . . shall be in writing, and shall be given only by one of the following methods: (a) if upon the Tenant either (i) by certified mail, return receipt requested, or by recognized overnight courier, in either case addressed to the Tenant at the address set forth above, with a copy to Tenant at the Premises (which copy may be sent regular mail), or (ii) by hand delivery to the Premises."

Joint Ex. J-1, ¶ 14; Joint Ex. J-7. Finally, Section 3 of the Extension confirmed that "[i]n all other respects, the terms and conditions of the Lease . . . are hereby ratified and affirmed." Joint Ex. J-1, ¶ 9; Joint Ex. J-7.

Aside from what is identified in the Extension as being amended, the balance of the Lease terms remain the same as between the parties. Importantly, Section 22 of the Lease remains in effect and provides as follows:

> "**SECTION 22. Structural Improvements:** In the event the Landlord desires to make structural improvements to the Premises, or to the property of which the Premises are a part, that may require the demolition and/or rebuilding of all or part of the Premises or property of which the Premises are a part, the Landlord shall have the right in its sole discretion to terminate this Lease upon One Hundred Twenty (120) days' prior written notice to Tenant, whereupon this Lease shall terminate and be of no further force or effect at the end of such 120 day period."

Joint Ex. J-1, ¶ 12; Joint Ex. J-6.

In April 2011, Plaintiff conducted a site assessment of each of its Rhode Island stores in conjunction with its desire to renovate and expand many of its stores across the state. Joint Ex. J-1, ¶¶ 18-19. CFI's store located on Unit One of the 1175 Main Street property was one of six

Rhode Island stores selected for renovation following that site assessment. Id. ¶¶ 19-20. The specific renovation plan for the store at 1175 Main Street is extensive, including the following specific goals:

> "[T]o demolish the entire commercial space down to the exterior wall, construct new interior walls, construct new restrooms in compliance with The Americans with Disabilities Act, construct a new glass storefront, install new coolers in a different location in the store, and move the checkout area to the center of the store in order to address safety concerns."

Id. ¶ 21.

Given the nature of this project on Unit One of the Subject Property, Plaintiff sought to terminate the Lease and Extension with Defendant pursuant to Section 22 of the Lease.

Plaintiff sent a notice dated December 7, 2011 to Defendant informing him of the termination of the Lease. Joint Ex. J-1, ¶ 15; Joint Ex. J-8. This notice was sent to Defendant in two ways: (1) by certified mail to 335 Bay Shore Drive in Venice, Florida, return receipt requested, with a copy sent to the same address via regular mail; and (2) by certified mail to the Subject Property, return receipt requested, with an additional copy sent to the Subject Property via regular mail. Joint Ex. J-1, ¶ 15; Joint Ex. J-8. The notice of termination informed Defendant that Plaintiff "desire[d] to make structural improvements at the property of which [Defendant's] leased premises [we]re a part," pursuant to Section 22 of the Lease. Joint Ex. J-8. The notice further stated that the Lease would be terminated as of April 30, 2012, and directed Defendant to "make all necessary arrangements to vacate the leased premises on or before" that date. Id.

C

Travel of Litigation

Following receipt of the notice of termination, Defendant filed a Verified Complaint in the United States District Court for the District of Rhode Island on January 27, 2012. Joint Ex. J-1, ¶ 17. That Verified Complaint alleged "counts for breach of contract, fraud in the inducement, deceit, as well as a claim for injunctive relief seeking to enjoin [Plaintiff] from terminating the Lease and repossessing the Premises." Id. On February 28, 2012, CFI commenced this action by filing a Complaint for Possession/Ejectment in Rhode Island's Fourth Division District Court, alleging that the federal action amounted to a breach of the Lease entitling Plaintiff to immediate termination of the Lease and possession of the leased premises. Id. ¶ 42. On July 3, 2012, an order entered in federal court staying litigation of that matter pending the conclusion of the state court eviction action before the Fourth Division District Court. Id. ¶ 17.

In June 2012, CFI filed an Amended Complaint in the Fourth Division District Court, identifying Plaintiff therein as "Cumberland Farms, Inc., individually and as Trustee of DJS Corp. Realty Trust." Id. ¶ 43. The matter was heard before the Fourth Division District Court over the course of several days in August 2012, after which a 58(a) Final Judgment dated September 20, 2012, and filed October 1, 2012, entered in favor of CFI. Defendant timely appealed to this Court and posted the appeal bond required by § 9-12-12 in the amount specified in the 58(a) Final Judgment.

Plaintiff contends that it is entitled to possession of the premises as well as damages pursuant to the terms of the Lease and Extension. Specifically, Plaintiff seeks two times the monthly rent set forth in the Extension as a holdover tenant pursuant to Section 28 of the Lease;

late payment fees pursuant to Section 3 of the Lease; interest on outstanding sums due pursuant to Section 3 of the Lease; and reasonable attorneys' fees and costs pursuant to Section 33(b) of the Lease. See Joint Exs. J-6, J-7. Defendant contends that Plaintiff lacked standing to bring this eviction action in the first instance because the October 2012 Confirmatory Trustee's Deed was insufficient to vest retroactive ownership rights in the Woodmansee parcel in CFI. Defendant further contends that he is not in breach of the Lease and/or the Extension.

II

Standard of Review

In a non-jury trial, the trial justice is responsible for deciding both issues of fact and questions of law. Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). As such, the trial justice "weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. However, "a trial justice need not engage in extensive analysis and discussion of all the evidence when rendering a decision in a non-jury trial; indeed, [e]ven brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case." Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 747 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (quotation omitted)).

An appeal from the District Court is no different in this regard. Such appeals are generally permitted under § 9-12-10, which states, in pertinent part:

> "[I]n all civil cases in the district court, any party may cause the case to be removed for trial on all questions of law and fact to the superior court for the county in which division the suit is pending, by claiming an appeal from the judgment of the district court . . . ."

Indeed, "all questions of law and fact are reviewable by the Superior Court on an appeal from a District Court judgment." Bernier v. Lombardi, 793 A.2d 201, 202 (R.I. 2002). In addition to

this general statute regarding appeals from the District Court, § 9-12-10.1 specifically permits such appeals in landlord tenant actions commenced in the District Court.

III

Analysis

A

Standing to Bring Action for Possession/Ejectment

"Trespass and ejectment is a summary action to recover 'possession of tenements or estates let, or held at will or by sufferance.'" R.I. Marine Transp. Co. v. Interstate Nav. Co., 52 R.I. 143, 158 A. 370, 371 (1932) (quoting Section 4758, Gen. Laws 1923 (chapter 330, § 28)). In order to state a prima facie case for possession and ejectment, Rhode Island law requires "a plaintiff make[] a prima facie case by proving (1) his title and (2) possession in the defendant." Id. at 371.

In this case, Defendant argues that Plaintiff's claims should be dismissed because Plaintiff lacks title or right to possession of the property. "In order to maintain an action for ejectment, the plaintiff generally bears the burden of establishing ownership or enforceable legal title to the subject property, . . . or at least present right of possession." 55 Causes of Action 2d 65, § 5 (2012) (internal citations omitted). Indeed, "[i]f the tenant has not attorned to the plaintiff and thereby estopped himself from disputing his landlord's title, the plaintiff must, at least, prove his title or other right to possession." R.I. Marine Transp. Co., 52 R.I. 143, 158 A. at 371 (emphasis added).

The evidence clearly reveals that the Woodmansee parcel, which comprises Unit Two of the Subject Property that Defendant leases, was not conveyed back from CFI-Trustee to CFI by way of the 2003 Quitclaim Deed. The failure to include the metes and bounds description of the

Woodmansee parcel in Exhibit A attached to the June 11, 2003 Quitclaim Deed, however, was inadvertent, as evidenced by the references therein to both "the real property located at 1175 Main Street" and the "same Premises conveyed" by the 1996 Quitclaim Deed. Joint Exs. J-4, J-5. While CFI-Trustee had vested title to the Woodmansee parcel at the time this action for possession and eviction was filed in the Fourth Division District Court, the Confirmatory Trustee's Deed served to vest title in the Woodmansee parcel in CFI effective nunc pro tunc once it was recorded.[2] Thus, CFI had vested title in the Woodmansee parcel, retroactive to the 2003 Quitclaim Deed, sufficient to satisfy its prima facie case for possession of the property. See R.I. Marine Transp. Co., 52 R.I. 143, 158 A. at 371.

The fact that the DJS Corp. Realty Trust Agreement terminated on June 30, 2007 does not alter this Court's conclusion. See Joint Ex. J-11. The Trust Agreement permits the Trustee to "retain such portion of the Trust Property as in its opinion reasonably necessary to discharge any expense or liability." Joint Ex. J-10, § 8.2. Thus, upon the termination of the Trust Agreement in 2007, it was permissible for the Woodmansee parcel to have been retained by CFI-Trustee, which was retained in such manner until the Confirmatory Trustee's Deed recorded in 2012 corrected the error in the 2003 Quitclaim Deed.

The Court notes that Defendant's contention that CFI lacked standing because title to the Woodmansee parcel remained with CFI-Trustee is without legal support. Rather, Defendant merely relies upon his cross-examination of Plaintiff's title expert, James Murphy, Esq., a seasoned and credible attorney who offered his professional title search and assessment of the marketability of title to the Subject Property. Both the inadvertent omission of the metes and bounds description of the Woodmansee parcel and the failure of CFI-Trustee to record the Trust

[2] "Nunc pro tunc" is defined as "[h]aving retroactive legal effect through a court's inherent power." Black's Law Dictionary 1097 (7th ed. 1999).

Agreement or a memorandum of trust at the time the 2003 Quitclaim Deed was recorded were corrected by the recording of the 2012 Confirmatory Trustee's Deed and the Trustees' Affidavit and Certificate Pursuant to R.I.G.L. § 34-4-27. Property ownership in this State would certainly be thrust into chaos if this Court accepted Defendant's unsupported argument that such errors, even once corrected, leave a defect in the chain of title spanning years or, in some cases, decades.

Moreover, even if this Court were to accept Defendant's argument in this case that CFI-Trustee is the proper party to pursue the possession and eviction action against Defendant, the result would be the same. The Amended Complaint filed in the Fourth Division District Court includes Plaintiff in both its corporate capacity and as Trustee of the DJS Corp. Realty Trust. Thus, Plaintiff, in both its corporate capacity and as Trustee, has the requisite title or other right to possession of Unit Two sufficient to sustain its prima facie case for trespass and ejectment.

For all these reasons, this Court rejects Defendant's contention that Plaintiff is without standing to pursue an action for trespass and ejectment, and expressly finds that the named Plaintiff—CFI both in its corporate capacity and in its capacity as Trustee of the DJS Corp. Realty Trust—has satisfied its prima facie case for trespass and ejectment

B

Breach of Lease

This Court must next determine whether there has been a breach of the Extension such that Plaintiff is entitled to possession of Unit Two and/or monetary damages. It is well settled that "[w]hen a contract is determined to be clear and unambiguous, then 'the meaning of its terms constitute a question of law for the court.'" Young v. Warwick Rollermagic Skating Ctr., Inc., 973 A.2d 553, 558 (R.I. 2009) (quoting Cassidy v. Springfield Life Ins. Co., 106 R.I. 615,

619, 262 A.2d 378, 380 (1970)). "In determining whether or not a particular contract is ambiguous, the court should read the contract 'in its entirety, giving words their plain, ordinary, and usual meaning.'" Id. (quoting Mallane v. Holyoke Mutual Ins. Co. in Salem, 658 A.2d 18, 20 (R.I. 1995)). "[T]he court should 'refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity * * * where none is present.'" Id.

At the outset, this Court finds that Plaintiff was well within its rights under Section 22 of the Lease to terminate the Extension. The plain meaning of Section 3 of the Extension clearly and unambiguously incorporates the terms of the Lease that were not expressly altered by Sections 1 and 2 of the Extension, stating that "[i]n all other respects, the terms and conditions of the Lease . . . are hereby ratified and affirmed." Joint Ex. J-1, ¶ 9; Joint Ex. J-7. One such section not altered by the terms of the Extension was Section 22 of the Lease, which clearly and unambiguously gives Plaintiff wide latitude to terminate the Extension in order to make improvements that "may require the demolition and/or rebuilding of all or part of the Premises." Joint Ex. J-6, § 22. The uncontradicted testimony of CFI's Senior Property Manager Kimberley Brakken revealed that the renovation project at hand would demolish and rebuild a portion of Unit One, which, in turn, will require demolition of all or part of Unit Two.

Defendant argues that Section 22 is illusory and unenforceable because it gives Plaintiff sole discretion to terminate the Extension at any time that it wishes to renovate the premises. Our Supreme Court has considered this very issue, stating:

> "In general termination clauses supported by adequate consideration are not illusory, but if a termination clause allows a party to terminate at any time at will without more, that promise is illusory. It is only binding on one party because the other party has in effect promised nothing. *See generally* I *Farnsworth on Contracts* § 2.14 (1990); I *Williston on Contracts* §§ 104, 105 (Jaeger 3d. ed. 1957). However, if the relevant provision requires the party to give notice a stated time before termination is

> effective, that promise is sufficient consideration for a valid contract, not rendering it invalid for lack of consideration or mutuality. *See generally* I *Williston on Contracts* § 105."

Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 335 (R.I. 1992) (emphasis added). Here, while the wide unilateral authority granted to Plaintiff to terminate the Extension under Section 22 may seem illusory, it clearly requires 120 days' written notice to the tenant. Joint Ex. J-1, ¶ 12; Joint Ex. J-6. By including this notice provision in Section 22, Plaintiff has offered sufficient consideration for a valid contract and, therefore, Section 22 of the Lease is not illusory. See Holliston Mills, Inc., 604 A.2d at 335.

Pursuant to Section 22, Plaintiff sent a notice dated December 7, 2011 to Defendant informing him of the termination of the Lease. Joint Ex. J-1, ¶ 15. In accordance with Section 2 of the Extension, the December 7, 2011 notice of termination was sent to Defendant in two ways: (1) by certified mail to 335 Bay Shore Drive in Venice, Florida, return receipt requested, with a copy sent to the same address via regular mail; and (2) by certified mail to the Subject Property, return receipt requested, with an additional copy sent to the Subject Property via regular mail. Joint Ex. J-1, ¶ 4; Joint Ex. J-7. The undisputed evidence of record demonstrates that Plaintiff complied with the notice requirements of Section 2 of the Extension.

Given that Plaintiff was within its rights to terminate the Extension and demand possession of the property effective April 30, 2012, over 120 days after Plaintiff provided written notice to Defendant, the mere fact that Defendant remains in possession of Unit Two is sufficient evidence that Defendant has breached the plain meaning of the terms of the Lease and the Extension. As such, this Court finds that Plaintiff is entitled to immediate possession of the premises and also monetary damages pursuant to the terms of the Lease, as incorporated into the Extension by Section 3.

C

Damages

This Court now moves on to assess the damages owed to Plaintiff based on the terms of those agreements. Section 28 of the Lease, which has been incorporated into the Extension by Section 3, states in pertinent part:

> "**SECTION 28. Holding Over by Tenant:** In the event that the Tenant shall remain in the Premises after the expiration of the term of this Lease without having executed a new written lease with the Landlord, such holding over shall not constitute a renewal or extension of this Lease, but shall be considered a tenancy at sufferance, entitling Landlord to rent at two (2) times the monthly rate charged immediately prior to the expiration of this Lease, as well as other remedies available at law in such situation."

Joint Ex. J-6, § 28. Here, Defendant's tenancy terminated and Defendant's holdover commenced on April 30, 2012, as indicated by the proper notice of termination dated December 7, 2011. From May 1, 2012 through December 31, 2012, the monthly rent pursuant to the Extension was $1071; on January 1, 2013, the monthly rent increased to $1124. Joint Ex. J-7, § 1. Rent is due on the first of each month. Joint Ex. J-6, § 1. Thus, pursuant to Section 28 of the Lease and the Extension, Plaintiff is entitled to monetary damages in double this amount for each month that Defendant has remained at the premises as a holdover tenant since May 2012, or $2142 for each of the eight months remaining in calendar year 2012, and $2248 for each of the nine months to date in calendar year 2013.

In addition to these doubled rent awards for the time spent as a holdover tenant, Defendant also owes certain late fees pursuant to Section 3 of the Lease, as incorporated into the Extension by Section 3. Section 3 of the Lease states in pertinent part:

> "Landlord shall be entitled to collect a late payment fee of Fifty Dollars ($50.00) for payment of Rent and/or Additional Rent not received within five (5) days after same is due (for purposes of this

> document the postmark of the payment shall serve as the payment date). Additionally, all sums due under this Lease not received when due shall accrue interest at the rate of Fifteen Percent (15%) per annum or the highest amount allowed by law, whichever is greater."

Joint Ex. J-6, § 3. Thus, Plaintiff is also entitled to an award of fifty dollars per month on all delinquent rent payments since May 2012.

Additionally, the plain language of Section 3 of the Lease subjects both these late charges and the base rental amounts due under Section 28 of the Lease subject to "interest at a rate of Fifteen Percent (15%) per annum or the highest amount allowed by law." Id. Given the monthly due dates that have come and gone while this matter has been pending, the interest rate is calculated as such amounts became due and late payment fee was assessed, namely on the fifth day of each month that rent was unpaid. Accordingly, monthly interest shall accrue at the rate of 1.25% and applied each successive month that rent was not paid. In other words, Plaintiff shall be entitled to 1.25% monthly interest calculated on $2192 (double monthly rent in 2012, plus $50 late payment fee) for each month from May 5, 2012 through December 5, 2012, and thereafter, Plaintiff is entitled to 1.25% monthly interest calculated on $2298 (double monthly rent in 2013, plus $50 late payment fee) for each month from January 5, 2013 through September 5, 2013.

With respect to attorneys' fees and costs, Section 33(b) of the Lease, as incorporated into the Extension by Section 3, provides as follows:

> "If Landlord commences, engages in, or threatens to commence or engage in any legal action or proceeding against Tenant arising out of or in connection with this Lease, the Premises, or the property of which the Premises are a part, Landlord shall be entitled to recover from Tenant reasonable attorneys' fees, together with any costs and expenses incurred in any such action or proceeding, including any attorneys' fees, costs or expenses incurred on collection and on appeal."

Joint Ex. J-6, § 33(b). Thus, the clear and unambiguous language of this provision entitles Plaintiff to attorneys' fees and costs related to any legal action or proceeding taken against Defendant.[3] A determination of the amount of attorneys' fees and costs owed will be determined upon the Court's receipt of affidavits supporting such amounts. See Trial Tr. 115:15-19, Feb. 19, 2013.

Finally, § 9-12-13 provides for an award of double costs where "the defendant claims an appeal and the judgment is for the plaintiff for the same or greater amount than that awarded by the district court." Should the final judgment, including attorneys' fees, exceed the $55,265.04 judgment entered in the Fourth Division District Court, then Plaintiff's costs shall be doubled.

IV

Conclusion

For the reasons set forth in this Decision, this Court finds in favor of Plaintiff. As such, Plaintiff is entitled to immediate possession of the premises known as Unit Two at the property located at 1175 Main Street in Richmond, Rhode Island. In addition, this Court finds that Plaintiff is entitled to money damages arising from Defendant's failure to surrender the premises upon the valid termination of the Extension on April 30, 2012. Such damages are calculated monthly from May 5, 2012 to the present, and include double monthly rent due as a holdover tenant as of the fifth of each month, plus $50 late payment fee, plus 1.25% monthly interest from the due date of each such monthly amounts to the present.

[3] Section 33(b) does not incorporate attorneys' fees and/or costs associated with actions taken by the Tenant arising out of or in connection with the Lease, and therefore Plaintiff's attorneys' fees and costs associated with defending the federal court action filed by Defendant are not properly included in the requested relief in the instant action.

Plaintiff is also entitled to an award of attorneys' fees and costs. This Court will accept affidavits supporting such attorneys' fees and costs, to be heard by the Court on the Formal & Special Cause Calendar, with notice to opposing counsel, prior to entering final judgment in this matter. Following such hearing, counsel for Plaintiff shall submit a judgment consistent with both this Decision and the Court's subsequent determination on attorneys' fees and costs.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Cumberland Farms, Inc., both in its corporate capacity and its capacity as Trustee of the DJS Corp. Realty Trust v. Kimon Dafoulas**
CASE NO:	**WD-2012-0596**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**September 12, 2013**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Elizabeth McDonough Noonan, Esq.** **Kyle Zambarano, Esq.**
For Defendant:	**Thomas A. Tarro, III, Esq.** **Kris R. Marotti, Esq.**