IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE T-BUILDING COMPANY	)	**CASE NO. CV 11 748701**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
HVL, INC., *et al.*	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

This lawsuit began on February 15, 2011, when plaintiff The T-Building Company filed a complaint against the three defendants: HVL, Inc.; Verona Enterprises, Inc.; and E & R Beverage, Inc., all signatories to a commercial lease. The complaint has causes of action for breach of contract and an action on an account.

Defendant HVL filed a counterclaim alleging breach of contract, breach of the covenants of good faith and fair dealing, and breach of the covenants of quiet enjoyment and habitability. The essence of the counterclaims is that The T-Building Company's failure to meet its obligations under the lease caused the defendant's liquor store business to fail, resulting in damages for lost profits. However, HVL did not produce its expert report on damages until less than a month before trial, making the expert's testimony inadmissible under Rule 21 of the Cuyahoga County Local Rules. Instead of excluding the expert entirely, the court, pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure, ordered that the element of

d for a later trial.

A bench trial on the plaintiff's claims and the duty, breach, and causation elements of HVL's counterclaims began on December 14 and ended on December 19, 2011. This entry follows.

FACTS

The T-Building Company owns the building at 3907-09 Mayfield Road in Cleveland Heights, the site of the old Center Mayfield Theater. The most recent use of the space in question before HVL's occupancy was as a Hollywood Video store. Other building tenants include a Chinese restaurant, a barber shop and a beauty salon. The premises includes a parking lot to the west of the building with about 44 parking spaces and a lot behind the building to the northeast with about 34 spaces. The plaintiff also controls about ten parking spaces on the other side of Mayfield Road at the southeast corner of the intersection with Noble Road. As of early 2009, approximately 50 of these spaces – including all of the west lot – were for customer parking only while all the other spaces were for use by building tenants and their employees. There are also several public metered spots on Mayfield in front of the building for customers' use.

In late 20

and advertised for lease. At the same time, Gene Veronesi, the sole shareholder of defendant Verona Enterprises, Inc., was trying to sell a liquor store that operated as Shaker Square Beverage in the Severance shopping center at 3622 Mayfield. According to Veronesi, the Severance store had a high volume of liquor sales and a respectable volume of beer and wine sales, but the excessive rent at Severance Center made it difficult to operate profitably there.

Malek E. Abboud is a law school graduate and majority shareholder of defendant HVL, Inc. He is also a minority shareholder, with his uncle Malek F. Abboud, of a liquor store in

North Randall known as Mookie's. Malek E. Abboud negotiated with Veronesi to buy Verona's liquor agency (the state contract that is needed to operate a liquor store) for $240,000. Because the state allots liquor agency contracts by region, Malek E. Abboud was constrained to continue operating at Verona's old location in Severance Center or somewhere else nearby. Staying at Severance was out of the question because Malek E. Abboud preferred a street-front location. He saw the plaintiff's building and decided to check it out.

Malek F. testified that not only did he help his nephew negotiate the agency sale with Veronesi, but that he learned about the plaintiff's location from Veronesi. After driving by the building, he formed the opinion that the space was too big and the parking lot too small. He was also unimpressed that the other tenants were all businesses where customers are prone to linger, thus taking up the relatively few available parking spaces. Indeed, at the Mook plaza in North Randall, he has turned down prospective tenants who have proposed to rent vacant space to operate businesses that would attract long-staying customers who tend to monopolize available parking.

He recommended to his nephew that, if HVL did decide to rent the building, the lease should include an agreement from the plaintiff to dedicate at least ten spots against the wall of the building in the west lot as parking for customers of the liquor store only.

Malek E. testified that he drove past the building 50 or 60 times at various hours on various days to observe the parking patterns. He noticed that the lot was not too full on Mondays through Wednesdays, but that it was often full on Thursdays through Saturdays, the busiest days for a liquor agency. Thus edified, he negotiated a lease with the plaintiff.

The lease was initially signed on December 22, 2008, but the five-year lease term was later amended to begin March 1, 2009 and end February 28, 2014. All three defendants signed

the lease jointly as the tenant. The contract required rental payments of $5,000 per month for the first three years and $5,500 per month for the last two years. Section 2.05 of the lease imposed a late charge of $30 per day for all payments not made when due. The contract also obligated the tenant to pay certain expenses including the cost of "maintaining the HVAC systems" (Section 12.01) and water, gas, and electricity (Section 14.01).

Although the majority of the lease was in a form proposed by The T-Building Company without alteration by the defendants, Malek E. did negotiate specific provisions pertaining to parking. Unable to persuade the plaintiff to agree to set aside spaces only for liquor store customers, Malek E. proposed, and the plaintiff agreed to, the following provisions at Section 5.02 of the lease:

> Owner agrees to manage the parking arrangements for the property so that tenant shall have adequate parking for tenant's customers.
>
> Owner shall designate ten parking spaces adjacent to the building as "twenty minute parking."

As to the latter provision, the plaintiff's property manager Michelle Feher testified that five "20 minute parking only" signs were placed on the west exterior wall of the building once HVL opened for business. Plaintiff's Exhibit 7 shows the signs were ordered January 20, 2009, and paid for in February. The plaintiff also posted "customer parking only" signs in the same area before the liquor store began operating. Additionally, about a year later, the plaintiff bought and posted six more "20 minute parking only" signs.

As for The T-Building's contractual obligation to "manage" the parking to ensure "adequate parking" for HVL's customers,

other tenants on many occasions to remind them of the importance of having available

customer parking and the need for tenants' employees to park behind the building or across the street.

Malek E. testified that parking was a problem even before the liquor store was open for business. During the weeks he helped get the store ready, he noticed that the west parking lot was usually full and that the same cars seemed to be there day after day, *i.e.*, tenants' cars. Once the store opened, he claims that "hundreds" of customers per week told him they had difficulty finding a parking spot, particularly on Thursdays, Fridays, and Saturdays. He complained to the landlord on a "near weekly" basis about the lack of parking, but T-Building's response seemed insufficient and the problems continued. In particular, Malek E. objected to the plaintiff's unwillingness to have tenants' cars towed from the premises.

Malek E. testified that the plaintiff's failure to manage the parking to ensure that his customers always had available spaces was the reason that "liquor sales weren't at what they were supposed to be" and forced him, in late 2010, to sell the liquor agency and close the store.

HVL sold the agency to Dave's Supermarkets for $520,000. The defendants left the premises and paid rent only through January, 2011.

LAW

A commercial lease is a contract. To prevail on its claim for breach of contract, the plaintiff must prove by a preponderance of the evidence: (1) that a contract existed; (2) that The T-Building Company fulfilled its contractual obligations; (3) that HVL and the other defendants failed to fulfill their obligations; and (4) that the plaintiff incurred damages as a

Schottenstein Zox & Dunn Co., LPA v. Reineke, 9th Dist. No. 10 CA 0138-M, 2011-Ohio-6201, 2011 WL 6016521, ¶12.

In this case the existence of the contract is admitted. Additionally, there is no question that HVL and the other defendants failed to fulfill their obligation to pay rent, utilities and late fees, and failed to pay for HVAC maintenance as agreed. The crux of this lawsuit, however, is the second element of a breach of contract claim: did the plaintiff landlord fail to fulfill its own obligations under the lease to designate ten spaces as 20-minute parking and to "manage the parking arrangements?" In Ohio, a non-breaching party to a contract is excused from complying with conditions of the contract when the party for whose benefit the condition operates has already materially breached the contract. *Waste Mgt., Inc. v. Rice Danis Indus. Corp.*, 257 F.Supp.2d 1076 (S.D. Ohio 2003). Therefore, if The T-Building Company did not breach its obligations, or, if it did but the breach was not a material failure of performance, then the breaches by HVL and the two other tenants are not excused and they are liable for damages proximately caused.

The T-Building's first obligation was to "designate ten parking spaces adjacent to the building as 'twenty-minute parking.'" The contract did not require the plaintiff to make the designation in any particular manner or by a certain date. The plaintiff undoubtedly complied with this obligation to the letter, notwithstanding the defendants' suggestions for more signs with more explicit language.

That leaves The T-Building's obligation to "manage the parking arrangements for the property so that tenant shall have adequate parking for tenant's customers." To begin with, the duty to "manage" the parking is non-specific and nebulous, especially in comparison with, for example, the defendants' specific obligation to pay $5,000 per month in rent. The same can

parking. Malek E. Abboud seems to interpret that to mean that if one of his customers could

not find a spot in the west lot, then the parking was inadequate. But this ignores the spots available behind the building or on the other side of Mayfield and the lease requires only adequate parking, not the closest or most convenient.

Additionally, assuming the plaintiff's obligations are specific enough to be enforceable, there is ample evidence that the plaintiff discharged its management obligation by frequently communicating with the building's other tenants about the need for workers to park only in their designated areas and to be mindful of other tenants' business needs. But when the same parking areas are leased to several tenants — at least a few of whom, judging by the evidence, are selfish and inconsiderate — there is only so much managing that can be done.

Finally, as to whether HVL's customers actually had adequate parking, Malek E. Abboud testified that before opening the store his accountant projected 2010 sales at $528,000 and taxable income at about $61,000. He then testified that the store's 2010 tax return showed actual receipts of $476,000 and actual taxable income of about $61,000. The fact that his customers found adequate parking and made their way into the store.[1]

For all of these reasons, the court finds that the plaintiff was not in material breach of its contractual obligations so as to preclude recovery for the defendants' breach of contract. Accordingly, the plaintiff is entitled to a judgment on its own claims in the amount of damages proximately caused by the defendants and to a judgment in its favor on the defendants' counterclaims.

The plaintiff's damages fall into several categories. First, the plaintiff is entitled to past due and future rent. The testimony established that the last payment made in February, 2011

---

[1] not credible since the $520,000 sales price alone is more than the listed receipts of approximately $476,000.

was for January, 2011 rent. Under the contract the defendants were to pay $5,000 per month through February, 2012, and then $5,500 each month through February, 2014. This amounts to $197,000 in unpaid past and future rent.

Second, the plaintiff produced evidence that showed undone HVAC maintenance as of January, 2011 (right after the defendants left the premises) in the amount of $3,930.02, a sum that included a necessary inspection. The defendants are liable for that amount.

Third, the plaintiff claims prospective late fees. The evidence shows that the defendants' rent was current when they left the premises. Section 21.01 of the lease gives the plaintiff the right to re-enter the premises if abandoned by the defendants, a right that The T-Building Company exercised, albeit only to try to mitigate its damages by re-renting the premises, in conjunction with the February lawsuit that effectively terminated the lease. Once the lease was terminated, the right to collect a late fee also ended. (See, *e.g.*, *Carter v. CPR Staffing, Inc.*, 8th Dist. App. No. 94671, 2010-Ohio-6026, 2010 WL 5065110, ¶19.) The plaintiff is, therefore, not entitled to an award of late fees.

Fourth, the plaintiff seeks an award of its estimated expense for utilities through the end of the contract. As noted above, the filing of this lawsuit on February 15, 2011, effectively constituted a written notice by the plaintiff of termination of the lease under Section 21.02. At

failed to prove by a preponderance of the evidence the amount of past and future utility payments by failing to offer as evidence of those amounts documents that can reasonably be inferred to exist, namely, bills for the various utilities. The plaintiff is, therefore, not entitled to an award of past and future utility expenses.

Last, the plaintiff seeks an award of attorney's fees based on Section 21.03 of the lease. That section provides that if the landlord successfully sues for a breach by the defendants, then the defendants "shall pay" the plaintiff's expenses "including a reasonable attorney's fee." Contractual provisions requiring a defaulting party to pay the other's reasonable attorney's fees are enforceable in Ohio. (See, *e.g.*, *Nottingdale Homeowners Ass'n. Inc. v. Darby*, 33 Ohio St.3d 32 (1987), syllabus.) There are no circumstances in this case to justify not awarding a reasonable attorney's fee and the amount of that fee will be established at a future evidentiary hearing.

CONCLUSION

Consistent with the foregoing findings of fact and conclusions of law, the court hereby enters judgment: 1) on the complaint in favor of the plaintiff The T-Building Company and against the defendants HVL, Inc., Verona Enterprises, Inc., and E & R Beverage, Inc., jointly and severally, in the amount of $200,930.02, with interest at the statutory rate beginning February 15, 2011, court costs, and a reasonable attorney's fee, the exact amount of which will be determined at a future evidentiary hearing; and 2) on the defendants' counterclaims in favor of the plaintiff at the defendants' cost.

IT IS SO ORDERED:

_____ Date: _____

SERVICE

A copy of this journal entry was sent by e-mail, this 31st day of January, 2012, to the following:

Mark Fusco, Esq.
mfusco@walterhav.com
Patricia F. Weisberg, Esq.
pweisberg@walterhav.com
Attorneys for Plaintiff

John W. Gold, Esq.
jgold@jwg-law.com
Attorney for Defendant

_____