IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

DIXIE SOUTHLAND CORPORATION, a Florida corporation

Plaintiff/Counter-Defendant,

v.

GRIFFIN INDUSTRIES, INC., a foreign corporation,

Defendant/Counter-Plaintiff.
_____/

Case No: 09-42396 CA (21)

CLOSING ARGUMENT OF PLAINTIFF DIXIE SOUTHLAND

Dixie Southland should entirely prevail because Dixie's breach of contract claim is completely proved.[1] Defendant's affirmative defenses fail in both law and fact and do not prevent Dixie's recovery.[2] Indeed, Defendant conceded Dixie's claim because Defendant stipulated to each of the necessary elements. Thus, the Court should award Dixie its compensatory damages, in the amount of $254,883.00, plus its prejudgment interest, attorney's fees, and the costs of this action.[3]

In sum, the single correct outcome in this case is that Dixie wins outright.

Defendant's affirmative defenses do not prevent Dixie from recovering its damages. Factually, Defendant failed to meet its burden of proof to establish its defenses. From a legal perspective, Defendant has not met the appropriate standard to sustain its defenses. Two main points eviscerate the defenses in this action. First, the doctrine of *caveat emptor* bars the defense of fraudulent misrepresentation. Second, Dixie breached no material provision of the lease, which eliminates the remaining affirmative defenses.

Similarly, Defendant cannot prevail on its counterclaim for breach of contract. Dixie did not breach any material portion of the contract, if it breached the contract at all. Under the plain language of the contract, Dixie was never obligated to have or obtain permits of any kind. Additionally, the lease was

[1] Dixie's Proposed Findings of Fact is attached hereto as Exhibit "1".
[2] Dixie's Proposed Conclusions of Law is attached hereto as Exhibit "2".
[3] Dixie's Proposed Form of Final Judgment is attached hereto as Exhibit "3".

a fully integrated legal agreement. Moreover, Defendant had every opportunity to investigate for itself if Dixie's Property suited its needs and make whatever adjustments to the lease it felt were necessary to protect its interests. Defendant cannot now ask this Court to rewrite its bargain on terms Defendant now feels would be more favorable.

I. Dixie proved its breach of contract claim and is entitled to recover its damages.

Dixie's breach of contract claim was established before the trial began. The parties stipulated to the three elements necessary to prove a breach of contract. The lease was a contract. Defendant breached the lease when it abandoned the Property in June 2009 and failed to pay any further rent. Because Defendant's abandonment was improper, Defendant now owes Dixie $254,883 in unpaid rent. These facts are undisputed; therefore, the Court should rule in favor of Dixie on the breach of contract claim.

II. Defendant's contract-based defenses fail as a matter of law.

The three contract-based affirmative defenses to Dixie's claim are not supported by the facts or the law. Dixie did not breach any material terms of the lease. Dixie never acted in anything other than good faith toward Defendant. Finally, the lease is a perfectly legal agreement. None of these three defenses operates to bar Dixie's breach of contract claim.

The lease itself is a fully integrated agreement that merged all previous discussions and negotiations. The lease's integration clause is set forth in Paragraph 24. Therefore, only the four corners of the lease should be considered as evidence. The lease proposal that Defendant argues substantiates various aspects of its defenses is extrinsic evidence that should not be part of the Court's analysis. Additionally, Defendant's assertion that the lease was properly terminated by the May 26, 2009 letter from Defendant's Deputy Counsel is wrong. Paragraph 4 of the Addendum to Lease explicitly states that the termination option could only be exercised in month 24 of the lease; otherwise the option would be

waived. Defendant did not exercise this option in month 24. There is nothing ambiguous about this provision; thus, the Court should find Defendant waived its option to terminate.

A. Dixie did not breach a material term of the lease.

A material breach of a contract must affect the essence of the contract. The failure to perform minor aspects of a contract is not actionable. S*ee Covelli Family L.P. v. ABG5, L.L.C.*, 977 So. 2d 749 (Fla. 4th DCA 2008). The essence of this contract is for a lease of industrial real estate. Dixie promised to provide the Property to Defendant for a term of five years in return for Defendant's promise to pay monthly rent. Everything else in this contract is ancillary to these two basic promises. Indeed, without either of these bilateral promises, there is no contract.

Defendant's argument that "permits" is a material term of the lease is not supported by the evidence. The best evidence of the parties' intent regarding material terms of the contract is the plain language of the lease. However, the word "permits" does not appear anywhere in the lease. Defendant's Deputy General Counsel, who negotiated the terms of the lease, avoided answering the direct question of whether or not the word "permits" appeared in the lease because he knew the word is simply not there. By a plain language reading of the lease, "permits" cannot possibly be a material term because the term does not exist in the lease.

The Court should not imply the term "permits" into the lease because there is no ambiguity in Paragraph 7 of the lease. Defendant offered no evidence that the Paragraph 7 was ambiguous, but concluded that the word "permits" should have been there. However, black letter law states that courts may not rewrite or add to the terms of the contract. Furthermore, a parties' subjective statements about intent, particularly when made at trial, are irrelevant. *Slusher v. Greenfield*, 488 So. 2d 579, 581 (Fla. 4th DCA 1986). "Permits" cannot have been a material term of the lease because it does not appear anywhere in the contract.

Moreover, the circumstances surrounding Defendant's lease of Dixie's Property strongly indicate that no fraud occurred. First, both Ms. Montalbano and Mr. Parker testified that at the time the parties

entered the lease; the leasing market for industrial property was a landlord's market. Second, both Ms. Montalbano and Mr. Parker testified that Defendant needed no incentives in order to enter into the lease. Third, the lease agreement was closed with a minimum of negotiation and in a brief period of time. Fourth, Mr. Parker testified that no one from Defendant's side even mentioned "permits" or "storm water," much less that Defendant requested such a requirement be included in the lease's terms. Fifth, Defendant is a sophisticated entity that has engaged in multiple property transactions across Florida. In Florida, experienced tenants are charged with a duty to make further inquiry into matters that it previously sought in its other transactions. *Winn-Dixie Stores, Inc. v. Dolgencorp*, 964 So. 2d 261 (Fla. 4th DCA 2007). Sixth, Defendant considered numerous other properties for its South Florida location prior to its selection of Dixie's Property. Indeed, Defendant's subjective testimony about its intent regarding "permits" is contradicted by the evidence. There is no other realistic conclusion on this point: "permits" is not a material term and Dixie cannot be deemed to have breached the contract because of it.

B. There was no breach of a material contract term; thus, no breach of the implied covenant of good faith and fair dealing can exist. Besides, Dixie always acted in good faith.

Florida law is well settled that there cannot be a breach of the implied covenant of good faith and fair dealing unless there is a breach of an express provision of the contract. As discussed above, Dixie did not breach any express material term of the contract; therefore, the defense based on the implied covenant of good faith necessarily fails. However, Defendant argues that Dixie breached its obligation to proceed in good faith when Mr. Parker sent the April 23, 2009 email that asked Defendant to have its employees put a flexible hose over the exterior wall. When confronted with this email, Mr. Parker testified that this itinerant email was a case of "Ready, Fire Aim!" Despite this particular email, Dixie should be judged by all of the other things Dixie did in a good faith effort to satisfy Defendant's concerns regarding storm water.

First, Dixie capped the pipe, which caused the Town of Davie to close its file. Second, Dixie re-routed the storm water to ensure it stayed within the Property's borders. Third, Dixie retained an engineering firm to design a new storm water system. Fourth, Dixie kept Defendant informed of these

developments. However, by the time the engineer designed a plan, which was permitted, Defendant had long since departed the Property. On balance, Dixie maintained good faith and fair dealing with Defendant at all times during the term of the lease.

C. The lease was a perfectly legal and enforceable agreement.

An illegal contract is one that contravenes a constitutional provision or a statute. Florida law favors the enforcement of contracts, so if an offending provision can be removed from the contract without affecting the essential bilateral promises, then the illegal term is severed and the contract remains enforceable. Dixie maintains that Defendant's illegality argument is completely without merit. However, even if Defendant's argument is considered, the allegedly illegal portions of the contract can be severed because they do not affect the core bilateral promises of the provision of land and the payment of rent. Therefore, the purported illegalities do not prevent Dixie from recovering on its claim.

To support its illegality defense, Defendant again attempts to convolute the plain language of the contract to create duties and responsibilities for Dixie where none exist. The lack of building permit cannot render the lease illegal because there is no provision in the Town of Davie's code for private enforcement of the code provisions. More importantly, the Town itself has not seen fit to issue any further correction notices to Dixie. As the testimony of the Town of Davie officials made clear, no further action was taken after the pipe was capped.

Defendant compounds its (erroneous) contention by arguing that Dixie's alleged failure to timely obtain permits for remedial storm water handling resulted in Griffin being in violation of the lease and further prevented Defendant from complying with the various laws, statutes, and ordinances. Defendant's arguments that it was put at risk of potential sanctions as a result of storm water discharge are too speculative. Indeed, when no injury is imminent, the law will not recognize a cause of action, or in this instance, a viable defense. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1992); *Edwin K. Williams & Co.-East v. Hustad*, 321 So. 2d 600 (Fla. 4th DCA 1975); 22 Am.Jur.2d Damages § 331 (damages based on uncertainties, contingencies, or speculation cannot be recovered).

Defendant overreaches with these arguments because they do not affect the illegality analysis. The question addressed in an illegality argument is whether or not the offending provision can be excised from the agreement and the remaining agreement fairly reflects the parties' intent. *Slusher v. Greenfield*, 488 So. 2d 579 (Fla. 4th DCA 1986). Defendant's subjective statements at trial about its motivations are not part of the test of whether a divisible contract exists. *Id.* Indeed, the lease expressly states that it is a divisible contract and its provisions can be individually excised without affecting the other provisions. Lease ¶ 19. There is no dispute that the parties' intent was to lease land. If the Court accepts Defendant's illegality argument, those provisions of the lease can be excised without affecting the essence of the contract. Therefore, the Court should find the illegality defense does not bar Dixie's recovery.

III. The doctrine of *caveat emptor* bars the fraudulent misrepresentation defense even though no fraud ever occurred.

In Florida, the doctrine of *caveat emptor* applies to leases of commercial property. The doctrine requires prospective lessees to investigate a property and determine for themselves if the property is suitable for their needs. When the lessee is a sophisticated entity that fails to exercise ordinary diligence, the law prevents that entity from asserting a claim for fraud. Moreover, the more experience an entity has in a particular area, such as this Defendant's experience and focus in environmental matters, the more responsibility the law places on that entity to look out for itself.

Defendant had every opportunity to investigate for itself if Dixie's Property suited its needs. Prior to signing the lease, Defendant did not perform basic due diligence. Now, Defendant sheepishly argues that it relied solely on the representations of the realtor instead of actually making its own investigation. Notably, Defendant devoted significant resources to the acquisition of this lease. Defendant had at least three representatives tour the Property on two different occasions. The Defendant's in-house counsel on the terms of the lease. Defendant maintains an environmental compliance department whose expertise certainly could have been drawn upon. Finally, Defendant's board of directors had to approve the lease prior to the lease's execution. With all of these resources

available and participating, Defendant cannot honestly argue that it blindly rested on the representations of Ms. Montalbano.

Caveat emptor prevents the defense of fraudulent misrepresentation. Defendant's arguments to the contrary are unavailing. The Court should find this defense does not bar Dixie's recovery.

IV. There was no fraudulent misrepresentation.

There are several flaws in Defendant's fraudulent misrepresentation defense, any one of which is fatal. First, there was no misrepresentation of a material fact. Second, Dixie had no intent to deceive Defendant into signing the lease. Third, as discussed above, Defendant could not justifiably rely on the purported representation of the realtor because of Defendant's experience and sophistication. These three factual and legal flaws prevent Defendant from sustaining its burden of proof regarding its fraudulent misrepresentation defense.

There are five elements necessary to establish the existence of a fraudulent misrepresentation: (1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; (4) action in justifiable reliance on the representation; and (5) consequent injury by the party acting in reliance on the representation. Defendant erroneously argues that element 2 should be evaluated from the perspective of the recipient of the representation. *Yost v. Rieve Enter., Inc.*, 461 So. 2d 178 (Fla. 1st DCA 1984). However, long-standing Florida law holds that the knowledge element for a fraudulent misrepresentation lies with the knowledge of the representor. *See e.g. Thor Bear, Inc.*, *v. Crocker Mizner Park,* 648 So. 2d 168, 173 (Fla. 4th DCA 1994). Additionally, Defendant relies heavily on *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), but *Johnson* applies only to residential real estate transaction, not the commercial one at issue here. *Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847, 849 (Fla. 4th DCA 2005). Nevertheless, the examination of the facts pertaining to each of the defense's elements demonstrates no defense exists.

First, there was no false statement of a material fact. According to Ms. Montalbano's testimony, none of Defendants' representatives ever asked her questions about storm water or permits at any time.

Indeed Ms. Montalbano testified that in her entire career, no one ever discussed "permits" with her. Similarly, Mr. Parker testified that no one discussed "permits" with him either. Defendant provided no evidence of any internal discussions that would suggest that either permits or storm water have the importance that Defendant's trial testimony implies. Additionally, if no false statement was ever made, then the second element also fails because one cannot have knowledge about a statement that did not occur.

Second, "permits" and storm water did not become material to Defendant until this litigation. Defendant argues that but for this representation about "permits," it would not have entered into the lease. The evidence does not support this assertion because the only evidence offered was the subjective statements of intent by Defendant's representatives. As discussed above, the Court can safely disregard this testimony because of its self-serving nature. More telling on this point is Defendant's duty to investigate those matters for which it believes might affect its tenancy. Indeed, Defendant is a sophisticated entity that maintains properties in several states and has locations across Florida. Defendant takes enormous pride in its environmental reputation. Under these circumstances, Defendant had an obligation to make a deeper inquiry into environmental matters. Defendant's failure to do so prevents it from successfully asserting the fraudulent misrepresentation defense. *See Winn-Dixie Stores, Inc. v. Dolgencorp*, 964 So. 2d 261, 266 (Fla. 4th DCA 2007).

Defendant's reliance on *Marquez-Gonzalez v. Perera*, 673 So. 2d 502 (Fla. 3d DCA 1996) is misplaced. *Marquez-Gonzalez* is completely distinguishable. The main difference between that case and the present one is the type of tenant attempting to assert fraud. In *Marquez-Gonzalez*, an individual plaintiff sought to open a small supermarket and restaurant at the leased premises. Here, Defendant is a sophisticated entity that has extensive experience with property transactions. Sophisticated entities such as Defendant have different, and greater, obligations placed upon them in a commercial property transaction. *See Winn-Dixie Stores, Inc. v. Dolgencorp*, 964 So. 2d 261 (Fla. 4th DCA 2007). Defendant cannot reasonably argue it was in the same position as the plaintiff in *Marquez-Gonzalez*.

Third, the uncontroverted testimony of Ms. Montalbano and Mr. Parker shows no effort beyond showing the Property in order to complete the transaction. Thus, neither Ms. Montalbano nor Mr. Parker could ever have possessed the intent to defraud or induce Defendant to enter into the lease. The circumstances surrounding the lease transaction demonstrate that no inducement was necessary to obtain Defendant's agreement to the lease's terms. As discussed above, the leasing market was a "landlord's market"; Defendant had been searching for other properties, but picked Dixie's; and no incentives were needed to close the deal. Therefore, this element of fraudulent misrepresentation is non-existent.

Finally, the latter elements of a fraudulent misrepresentation have also not been proven. As discussed at length above, Defendant could not justifiably rely on the alleged representation because of its status as a sophisticated experienced entity. Also, Defendant has not proved any actual injury as a result of the non-existent misrepresentation. Defendant's proof at trial was a general statement about damages; however, Defendant did not differentiate between its supposed damages from fraud and its damages from a breach of contract. Indeed, the damages Defendant asserted at trial would have been incurred regardless of any supposed wrongdoing by Dixie because Defendant had already committed to moving to a separate property months before any problems arose at Dixie's Property. Additionally, Defendant received no citations, faced no penalties, paid no fines, attended no hearings, and lost no money, property, customers, or business goodwill.

In the final analysis, no misrepresentation of any kind occurred. Even if it did, Defendant still had the legal obligation to conduct more thorough due diligence than it performed. Defendant argues it could blindly rely on the realtor's representations; however, the more detailed analysis of the facts and law dictate otherwise. The Court should deny the misrepresentation defense in its entirety.

V. The Property was always tenantable and no constructive eviction occurred

The Property was always safe, fit, and suitable for occupancy. The alleged illegal status of the Property did not affect Defendant's use of the Property. Dixie's Property was always tenantable by Defendant. First, after Dixie complied with the Courtesy Notice, the Town of Davie closed the case.

Defendant paid no fines, attended no administrative or judicial hearings, and was never contacted by the Town of Davie ever again. Second, because Dixie never required storm water permits during Defendant's tenancy, Defendant cannot claim that a lack of storm water permits made the Property untenantable.

To maintain a claim for constructive eviction, a tenant must give the landlord notice and an opportunity to remedy the issue. Here, as soon as Defendant informed Dixie of the Courtesy Notice, Dixie took multiple steps to ensure the storm water drainage issue was repaired. However, the steps involved to fully correct were not finally implemented until well after Defendant had left the Property. A tenant is not excused from paying rent if the needed repairs do not make the premises untenantable. Defendant testified that it continued to operate its business while Dixie worked on getting the repairs completed. Ultimately, Defendant simply took advantage of an inconvenient situation because it had committed to moving its operations to the property it purchased in Pompano Beach, Florida.

Defendant's arguments that it was potentially subject to administrative enforcement actions or criminal investigation ring hollow because the matter arising from the Courtesy Notice was closed after Dixie capped the pipe. Defendant testified that no government agency at any level took any action regarding the Courtesy Notice. Defendant's fears and speculation are not actionable and certainly did not make the premises untenantable. The Court should quickly dispose of this defense as lacking in both fact and law.

VI. Defendant's counterclaim for breach of contract is without merit

For all the reasons already discussed, Defendant's breach of contract claim cannot stand. Dixie did not breach a material term of the contract.

CONCLUSION

From the beginning of trial, the outcome of this case turned on the viability of Defendant's affirmative defenses. The evidence adduced at trial and the governing law demonstrate that none of Defendant's affirmative defenses prevent Dixie from succeeding on its claim. Dixie neither breached a material term of the contract nor the implied covenant of good faith and fair dealing. The contract was a legal agreement that is and remains enforceable against Defendant. There was no fraudulent misrepresentation regarding "permits" or storm water. More importantly, even if there was a representation, Defendant could not justifiably rely upon it because of Defendant's status as a sophisticated entity that has extensive experience in environmental matters. Moreover, *caveat emptor* bars Defendant's use of a fraudulent misrepresentation defense. Finally, the Property was always tenantable and Defendant was never constructively evicted. With the defenses disposed of on their lack of merit, the single outcome of this case remains – **Dixie entirely prevails**.

WHEREFORE Plaintiff Dixie Southland requests this Court enter judgment in its favor and against Defendant on all matters raised in this action. The Court should award Dixie its damages, attorney's fees, the costs of this action, and all other relief the Court deems just and proper. The Defendant should take nothing from this action.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically to

33130 on this 1st day of February, 2013.

February 1, 2013

Respectfully submitted,

Attorneys for Plaintiff
1401 Brickell Avenue, Suite 825
Miami, Florida 33131
Tel: 305-373-0330; Fax: 305-373-3527

A. J. Yolofsky
Florida Bar No.: 911321
ajyolofsky@ .com
Susan Giles-Klein
Florida Bar No.: 99415
sklein@ .com