

**IN THE COURT OF COMMON PLEAS FOR PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL**

S&H PANG PARTNERSHIP

MARCH TERM, 2008

Plaintiff,

No. 5276

vs.

COMMERCE PROGRAM

KINNEY OF RACE STREET, INC.,
CENTRAL PARKING SYSTEMS,
PATRIOT PARKING

Defendants.

OPINION

Plaintiff landlord S&H Pang Partnership (“Pang”) appeals from three Orders entered in this matter on February 24, 2011, April 16, 2012, and May 14, 2012.¹ The 2011 Order was issued by the late Judge Sheppard simultaneously with his Findings of Fact and Conclusions of Law after a non-jury trial of the parties’ commercial landlord-tenant dispute.²

In his 2011 Order, Judge Sheppard found that defendant tenants, Kinney of Race Street, Inc. and Central Parking Systems (collectively “Central”), were in breach of the parties’ lease (the “Lease”) for failure to maintain the Property³ and were thereby liable to Pang “for one-half the cost of the repair work necessary to replace the roof, repair the ramps, and to waterproof the subject Property,” which work had not yet been performed by either party.⁴ In addition, Judge Sheppard found landlord Pang was liable to tenant Central for breach of the parties’ Lease for

¹ The parties entered judgments on the court’s Orders in July, 2012, so the appeal is deemed to have been filed after those judgments were entered.

² A copy of Judge Sheppard’s Order and Findings of Fact and Conclusions of law are attached to this Opinion.

³ The “Property” is located at 1030-1038 Race Street in Philadelphia’s Chinatown.

⁴ As of May, 2012, this necessary repair work still had not been commenced by either party, and the decaying Property continues to be used as a parking garage open to the public in the midst of a busy commercial and residential neighborhood.



failure to install guardrails and failure to restore the facade of the Property. Furthermore, Judge Sheppard found Pang liable to Central in the amount of \$49,238.34, which is what Central spent to repair a damaged wall at the Property. In other words, Judge Sheppard found both parties to be at fault for the deteriorating state of the Property.

Judge Sheppard reserved judgment on whether to award attorneys' fees to either party and how much the necessary repairs would cost. After Judge Sheppard passed away, the case was assigned to this court, who entered the other two Orders complained of on appeal.⁵ In the April 2012 Order, this court ruled on the parties' Post-Trial Motions. The court found that neither party was entitled to an award of attorneys' fees. The court also found that it needed to appoint a Receiver to oversee the making of the necessary repairs to the Property, which the court estimated would cost at least \$2 million. In the May 2012 Order, the court amended its prior Order to require any appellant to post a \$250,000 bond in the event of an appeal, which Pang subsequently did.

In its Statement of Matters Complained Of On Appeal, Pang objects to Judge Sheppard's ruling that Pang is responsible to install guardrails and restore the façade and that Pang is liable to reimburse Central \$49,238.34 for repair of a wall. The Lease provides that Central, as tenant, is responsible for "non-structural repairs" and to "maintain the concrete surfaces and ceilings within" the Property, while Pang as landlord, is responsible for "all structural repairs" unless they were caused by Central.⁶ Judge Sheppard properly found that Central's repair of a wall was a structural repair for which Pang is liable to reimburse Central. He also found that the installation of guardrails and the restoration of the façade are structural repairs for which Pang is liable. Pang's failure to make such structural repairs was a breach of the parties' Lease.

⁵ Copies of the April 16, 2012, and May 14, 2012 Orders are attached hereto.

⁶ Lease, ¶ 9.

Pang also objects to Judge Sheppard's finding that Central is liable for only one-half of the cost to repair the roof and ramps and waterproof the building. However, Judge Sheppard expressly found that only half of such structural repairs were caused by Central's failure to maintain the interior.⁷ The other half are the responsibility of Pang, as landlord, under the Lease.⁸

Unfortunately, since Pang had not performed these necessary structural repairs, and the parties gave such widely varied estimates of the cost of such repairs,⁹ it was impossible for Judge Sheppard to quantify the damages due from Central to Pang for half such repairs. Furthermore, given the danger to the public of the deteriorating Property and the parties' unwillingness to cooperate or to undertake the necessary repairs themselves, this court deemed it appropriate to appoint a Receiver to insure that the repairs were made quickly and efficiently, with the costs borne equally by both parties as prescribed by Judge Sheppard.

Because the court's best estimate of the cost of the necessary structural repairs was \$2 million, with each party to pay half, the court ordered any appealing party to post a bond in the amount of its contribution of \$1 million. Pang moved for reconsideration and represented that it was unable to obtain a bond in that amount. As a result, the court lowered the bond amount to \$250,000, the amount of each party's first installment payment towards the cost of the repairs, and Pang was able to obtain its appeal bond.

Pang also objects that this court did not award it attorneys' fees under the Lease, which

⁷ Specifically, the court found Central failed to seal the floors and failed to clean up snow removal salts which caused the concrete floors to deteriorate.

⁸ The court found that the remainder of the structural repair work was necessitated by Pang's ill conceived conversion of the building from a closed factory building to a garage open to the elements.

⁹ The quotes Pang received from local contractors ranged from \$1,758,720 to \$2,153,340, while Central's expert's estimates ranged from \$800,000 to \$4,500,000. Given these divergent figures, this court estimated \$2 million would be sufficient to cover the repairs.

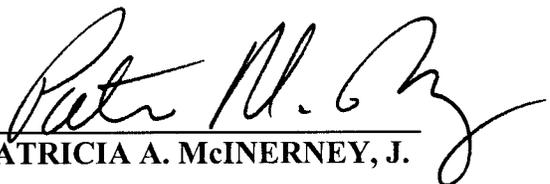
provides as follows:

. . . if [Pang] is compelled to incur any expense, including reasonable counsel fees, in instituting, prosecuting or defending against any action or proceedings instituted by reason of any default of [Central] hereunder, the amount of such payments or expense shall be paid by [Central] to [Pang] as additional rent . . .¹⁰

While this action was instituted by Pang as a result of perceived defaults by Central under the Lease, the court did not find Central liable for several of those alleged defaults.¹¹ With respect to the one default for which the court did find Central liable, the court also found Pang to be more liable, *i.e.*, Pang and Central were both found liable for half the future repairs, but Pang was also found liable to reimburse Central for repairs already made. Pang's attorneys fees incurred in this extremely contentious litigation were not incurred solely "by reason of" Central's actual defaults under the Lease, so it cannot recover those fees from Central under the Lease.

For all the foregoing reasons, the court respectfully requests that its and Judge Sheppard's Orders be affirmed on appeal.

Dated: September 12, 2012


PATRICIA A. McINERNEY, J.

¹⁰ Lease, ¶ 23(i).

¹¹ The court did not find Central in default for improperly assigning the Lease, for unlawfully subletting, nor for maintaining inadequate insurance, all as claimed by Pang.