

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

CHEST-PAC ASSOCIATES, L.P.,	:	May Term 2020
Plaintiff,	:	
v.	:	No. 1242
DEL FRISCO'S OF PHILADELPHIA, INC.,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Nos. 20122110/21011885

ORDER

AND NOW, this ¹⁴25 day of March, 2021, upon consideration of the parties' cross motions for summary judgment, the respective responses in opposition, the record and in accord with the attached Opinion, it hereby is **ORDERED** as follows:

1. Plaintiff's Motion for Summary Judgment is **Denied**.
2. Defendant's Motion for Summary Judgment is **Granted** and judgment is entered in favor of Defendant and against Plaintiff. Plaintiff's amended complaint and Defendant's counterclaim are dismissed.

BY THE COURT,



GLAZER, J.

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OPINION

Plaintiff Chest-Pac Associates, L.P. ("Plaintiff"), a landlord, brings this action against defendant Del Frisco's of Philadelphia, Inc. ("Del Frisco's"), its tenant, seeking possession of the premises located at 111 South 15th Street, Philadelphia, PA 19102. Presently pending before this court are the parties' cross motions for summary judgment. For the reasons discussed below Plaintiff's request for possession is denied and Del Frisco's motion for summary judgment is granted.

The Parties

Plaintiff is a Pennsylvania limited partnership and the owner of the property located at 111 South 15th Street, Philadelphia, PA 19102. Defendant is Del Frisco's of Philadelphia, Inc., a Pennsylvania corporation, and an upscale steakhouse located in Center City Philadelphia. On December 21, 2007, plaintiff and Del Frisco's entered into a ten year written lease with four renewal terms of five years each for the real property located at 111 South 15th Street, Philadelphia, PA 19102. The real property consists of approximately 23, 614 square feet on the ground floor, mezzanine, and lower level of the property. Del Frisco's, on October 5, 2017, exercised its right to renew the Lease for an additional five year term.

The Lease

Pursuant to the Lease, Del Frisco's is permitted to use the building "solely for the operation of an upscale steakhouse and bar operating as typical 'Del Frisco's Double Eagle Steakhouse' and for any other lawful full service, sit down restaurant use under any trade name." The Lease requires Del Frisco's to pay plaintiff a fixed minimum rent and additional rent consisting of taxes, insurance, and common area charges on or before the first of each month. The current monthly rent obligation is \$72,047.20. According the Lease, if Del Frisco's fails to pay the rent within five days of the first of the month a late charge of 5% of the rent is charged.

The Lease defines a monetary default as an event of default. A monetary default is defined by the Lease as follows:

If Tenant fails to pay any Rent on the date when due and such default shall continue for a period of five (5) business days after written notice of such default from Landlord shall be received by Tenant. Notwithstanding anything to the contrary contained herein, Landlord shall not be obligated to give the aforementioned notice more than twice during any twelve (12) month period.¹

The Lease further provides that during the continuation of an event of default, plaintiff may, at its option, exercise a number of remedies including the following:

- (a) Termination of Lease. Landlord may terminate this Lease, by written notice to Tenant, without any right by Tenant to reinstate its rights by payment of rent due or other performance of the terms and conditions hereof. Upon such termination, Tenant shall immediately surrender possession of the Leased Premises to Landlord, and Landlord shall immediately become entitled to receive from Tenant an amount equal to the aggregate of all accrued and unpaid Fixed Minimum Rent, Additional Rent and all other accrued and unpaid sums or charges which then remain due to Landlord but unpaid by Tenant.²

The Lease requires that all notices given under the Lease must be in writing. Notice shall be given by personal delivery or by recognized overnight courier service that provides

¹ See Lease ¶ 27 (a).

² See Lease ¶ 28 (a).

confirmation of delivery. The Lease further provides the identity and the addresses of where the notice is to be delivered.³

COVID-19 and Executive Orders

In December 2019, COVID-19 began infecting humans in China and spread to other countries including the United States. Beginning in March 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency and issued a series of executive orders in an effort to slow the spread of the virus. On March 19, 2020, Governor Wolf issued the following Executive Order which provides in part as follows:

Section 1: Prohibition on Operation of Businesses that are not Life Sustaining

No person or entity shall operate a place of business in the Commonwealth that is not a life sustaining business regardless of whether the business is open to members of the public.

Section 2: Prohibitions on Dine-In Facilities including Restaurants and Bars

All restaurants and bars previously have been ordered to close their dine-in facilities to help stop the spread of COVID-19.

Businesses that offer carry-out, delivery, and drive through food and beverage service may continue, so long as social distancing and other mitigation measures are employed to protect workers and patrons.

Enforcement action will be taken against businesses that are out of compliance effective March 23, 2020.

Thereafter, Governor Wolf devised a plan to reopen Pennsylvania in three phases (red, yellow and green). Philadelphia officials delayed the City's green reopening until August 1, 2020.

On July 16, 2020, Governor Wolf signed another executive order implementing new restrictions on bars, restaurants and nightclubs statewide because of a spike in COVID- 19 cases

³ See Lease ¶ 30.

which prohibited the operations of Pennsylvania bars, restaurants, and nightclubs unless they offered “sit-down, dine in meals or takeout sales of alcoholic beverages.” Restaurants were limited to 25% of stated fire code maximum for indoor dining. The executive order permitted alcohol to be served for on-premises consumption when in the same transaction as a meal; bar service was prohibited. Philadelphia did not allow the restaurants to offer indoor seating until September 8, 2020.

From September 8, 2020 until November 20, 2020, Del Frisco’s reopened for indoor dining service to 25% capacity. From November 20, 2020 through January 15, 2021, indoor dining was barred once again and Del Frisco’s was limited to carry out and delivery options.

Landlord and Tenant Interactions

On March 12, 2020, Del Frisco’s wrote to plaintiff “in effort to mitigate the effects of COVID- 19” and requested “an immediate reduction in total occupancy costs of at least 50%, if not more, for the upcoming three month period beginning April 1, 2020” due to decreased sales and an expectation of a worsening situation as a result of COVID-19 and the issuance of Executive Orders. On March 27, 2020, Del Frisco wrote once again to plaintiff to “address the ever-evolving COVID- 19 crisis and the impact it continues to have on the operation of the restaurant. Del Frisco informed plaintiff that while ‘to go’ and ‘curbside operations’ may be allowed, these operations yield little to no sales and only help to possibly salvage a few jobs of critical store employees at a loss...”

Del Frisco’s informed plaintiff it was

“committed to using good faith efforts to minimize the economic impact, preserve employee benefits, and salvage as many jobs as possible with what little revenue we can muster under the weight of this crisis. We have taken extreme measures across our entire organization, including employee furloughs and company-wide 50% salary reductions for all remaining essential employees. We have made claims under our business interruption policies...Given the ever-evolving situation and the uncertainty of how long this will last,

it is imperative that [Del Frisco's]...conserve our limited liquidity over the next 90 days to cover health insurance for our furloughed employees and essential employee expenses."

Del Frisco's notified plaintiff it could not pay rent for April 2020 and asked that "beginning in April 2020, all rent and other charges under our lease be fully abated for the next three (3) months." Additionally, Del Frisco's invited an open dialogue and was committed to keeping plaintiff informed as this crisis evolves.

In response, plaintiff sent Del Frisco's two letters dated April 7, 2020. The first letter was a notice of late payment of rent and additional rent. The letter notified plaintiff that "If Tenant's failure to pay continues for five (5) business days from the date of receipt of this letter, it will constitute an additional event of default under the Lease and Landlord reserves all its rights to any and all of its remedies under the Lease." At no time did plaintiff give Del Frisco's notice that it was terminating the Lease. The second letter indicated that plaintiff would evaluate Del Frisco's request and requested that Del Frisco's sign a pre negotiation letter and submit certain information to better evaluate the situation.

On April 14, 2020, Del Frisco responded to plaintiff's letter disputing that it was in default of the lease and submitted an offer to plaintiff which consisted of rent abatements for payments due. On April 15, 2020, plaintiff responded to Del Frisco's letter advising that it hoped to reach an amicable resolution to the situation.

On May 7, 2020, plaintiff once again notified Del Frisco's that it was in default of its obligations under the Lease for failing to pay rent and demanded that Del Frisco's cure its default within five days. Plaintiff further stated in the May 7, 2020 letter "If Tenant's failure to pay continues for five (5) business days from the date of receipt of this letter, it will constitute an additional event of default under the Lease and Landlord reserves all its rights to any and all of

its remedies under the Lease.” At no time did plaintiff give Del Frisco’s notice that it was terminating the Lease.

On May 11, 2020, plaintiff sent Del Frisco’s a letter rejecting the offer of rent abatement in the April 14, 2020 letter, informed Del Frisco’s that it was in default and proposed a counter offer of rent payments. On May 21, 2020, plaintiff instituted this action against Del Frisco’s for breach of the Lease for failure to pay rent. On July 2, 2020, plaintiff filed an amended complaint adding two causes of action, declaratory relief and possession of the premises. On October 1, 2020, defendant filed its answer to the amended complaint and asserted a counterclaim seeking a declaration that COVID-19 constituted a casualty under the Lease.

In November 2020, Del Frisco’s paid all rent, late fees, interest and taxes due and owing under the Lease from March 1, 2020 through November 2020. The December, 2020 rent was paid on time.⁴ Prior to March 2020, Del Frisco’s did not owe plaintiff any rent, late fees, interest or taxes. The parties have now filed cross motions for summary judgment.

DISCUSSION

In Pennsylvania, a lease is a contract that is governed by principles of contract law.⁵ Here, plaintiff seeks possession of the leased property from Del Frisco’s based on its failure to pay rent when due. While the Lease does permit plaintiff to terminate the Lease and re-possess the leasehold, at this time, such a remedy is inappropriate and would constitute an unacceptable forfeiture.

⁴ Del Frisco’s did not pay plaintiff \$11,256.91 which represented attorney fees and costs from March 2020 to present. See, Del Frisco’s Exhibits attached to its motion for summary judgment- Exhibit “B” Interrogatory # 13.

⁵ *Willison v. Consolidation Coal Co.*, 536 Pa. 49, 54, 637 A.2d 979, 982 (1994).

Pennsylvania law permits forfeiture of a tenant's right to possess the leased premises for non-payment of rent. However, a court should not enforce forfeiture "when the contract has been carried out or its literal fulfillment has been prevented by oversight or uncontrollable circumstances."⁶ Forfeiture is strongly disfavored and strictly construed in both law and equity.⁷ Courts seek to avoid forfeitures particularly where there has been considerable part performance. In fact, the doctrine of substantial performance was created by the courts to use as an instrument of justice intended to avoid forfeiture because of technical, inadvertent or unimportant omissions. The doctrine is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars.⁸ However, application of the doctrine of substantial compliance should not be used indiscriminately in all lease situations and careful attention to the lease agreements as well as the situations surrounding the defaults should be considered and weighed.⁹

The doctrine of substantial compliance is most applicable to case at bar to negate forfeiture of the leased premises. Here, it is undisputed that in November 2020, Del Frisco's paid all the rent and additional rent that was due from March, 2020¹⁰ to November 2020, timely paid the rent due for December 2020 and as of the filing of the parties' cross motions for

⁶ *Atlantic LB, Inc. v. Vrbicek*, 905 A.2d 552, 558 (2006) quoting *Barracough v. Atlantic Refining Co.*, 230 Pa. Super. 276, 326 A.2d 477 (1974).

⁷ *Id. citing Liakis v. Kosta, Inc.*, 421 Pa. Super. 502, 618 A.2d 450, 455 (1992).

⁸ *Id. citing First Mortg. Co. of Pa. v. Carter*, 452 A.2d 835, 837 (Pa. Super. 1982).

⁹ *Id.*

¹⁰ Del Frisco's alleges that it timely paid the rent for March 2020. Plaintiff alleges that the nonpayment of rent spanned from March 2020 to November 2020. At this time, whether the March 2020 rent was paid on time is not relevant to this decision since it is undisputed that at the time the parties filed their cross motions for summary judgment, Del Frisco's had a zero balance on its rental obligations.

summary judgment Del Frisco's rent balance was zero.¹¹ As such, Del Frisco's has satisfied its rental obligations under the Lease and has technically cured its default. While the Governor and Mayor's COVID-19 executive orders do not relieve or excuse Del Frisco's obligation to pay rent under the Lease, one cannot turn a blind eye to the unfortunate economic impact that such orders had on Del Frisco's ability to timely pay its rent, especially since prior to March 2020, Del Frisco's was current with its rental obligations.¹²

Moreover, in further support of applying the doctrine of substantial compliance to the case at hand, the record shows that Del Frisco's did not ignore its rental obligations. On the contrary, Del Frisco's was proactive and initiated a dialogue with plaintiff attempting to make a good faith effort to negotiate a rent abatement with plaintiff beginning March 12, 2020 based on the evolving COVID-19 situation. Indeed, plaintiff and Del Frisco's exchanged written communications wherein offers and counteroffers were proposed to temporarily address issues presented by COVID 19 and the government orders.¹³ Since Del Frisco's paid its outstanding rental obligations, albeit after this action was filed, and attempted to negotiate a solution with plaintiff, the court finds that the doctrine of substantial compliance applies and plaintiff's request for possession is denied as it would amount to an unacceptable forfeiture.

Additionally, notwithstanding the application of the doctrine of substantial compliance to the facts at hand, plaintiff's request for possession is also denied as improper since plaintiff failed to give Del Frisco's proper notice under the Lease. Paragraph 28 (a) of the Lease

¹¹ See, Del Frisco's Exhibits attached to its motion for summary judgment – Exhibit "B" Interrogatory # 9, 10, 11, and 12.

¹² *Id.*

¹³ See Del Frisco's Exhibits attached to its motion for summary judgment- Exhibits "C-E, G-H, and J".

specifically provides that plaintiff may terminate the Lease by written notice to Tenant and that upon such termination, Tenant shall immediately surrender possession of the property to Landlord. Plaintiff never gave Del Frisco's written notice that it was terminating the Lease. Plaintiff's letters dated April 7, 2020 and May 7, 2020 do not satisfy the notice requirement of paragraph 28 (a) since those letters solely provided notice of late payment of rent and additional rent.¹⁴ Moreover, adding a claim for possession to the amended complaint does not constitute written notice as required by the Lease. Since, plaintiff failed to give Del Frisco's written notice that it was terminating the Lease, plaintiff's request for possession fails.¹⁵

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is denied and Del Frisco's motion for summary judgment is granted. Plaintiff's amended complaint and Del Frisco's counterclaim are dismissed.¹⁶

BY THE COURT,



GLAZER, J.

¹⁴ See Del Frisco's Exhibits attached to its motion for summary judgment- Exhibits "F" and "I".

¹⁵ The court does not accept plaintiff's waiver argument as Del Frisco's did allege in its answer and new matter that plaintiff's amended complaint fails to state a claim upon which relief could be granted and that plaintiff's claims were barred under the terms of the Lease. Del Frisco's answer and new matter to plaintiff's amended complaint ¶¶ 34, 37.

¹⁶ Plaintiff's request for attorney fees and costs is denied since plaintiff is not a prevailing party. Paragraph 49 of the Lease provides as follows: "If either Landlord [Plaintiff] or Tenant [Del Frisco's] brings suit or other legal proceedings to enforce the provisions of this Lease against the other, then the party prevailing in such suit shall be reimbursed by the other for all reasonable attorneys' fees and litigation costs incurred by the prevailing party in connection with such suit or proceeding." Plaintiff is not the prevailing party and therefore it is not entitled to recover reimbursement of its attorneys' fees and costs. Additionally, Del Frisco's is not a prevailing party under the terms of the Lease. Del Frisco's request for declaratory relief is denied. COVID – 19 does not constitute a "casualty" under the terms of the Lease.

Additionally, plaintiff is not entitled to recover attorney fees and costs under ¶ 28 (m) of the Lease since this court finds that Del Frisco's substantially complied with the terms of the Lease and cured any default by paying all outstanding rental obligations.