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

FEDERAL REALTY INVESTMENT TRUST	:	March Term 2022
n/k/a FEDERAL REALTY OP, LP,	:	
Plaintiff,	:	No. 2719
v.	:	
RAO 8 INC. d/b/a DUNKIN DONUTS, MITAL	:	COMMERCE PROGRAM
H. RAO and RADHA M. RAO,	:	
Defendants.	:	Control Number 22044459
	:	

DOCKETED

JUL 25 2022

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 25th day of July, 2022, upon consideration of Defendants Rao 8 Inc. d/b/a Dunkin Donuts, Mital H. Rao and Radha M. Rao's Petition to Open Confessed Judgment, Plaintiff's Response in Opposition, Supplemental Filings, all matters of record and in accord with the attached Opinion, it hereby is **ORDERED** that the Petition to Open Judgment is **Denied**.

It is further **ORDERED** that Defendants shall **VACATE** the premises at 9173 E. Roosevelt Boulevard, Philadelphia, PA, 19114, Store #37 in the Northeast Shopping Center (the "Premises") within thirty (30) days. If Defendants fail to Vacate the Premises within thirty (30) days, Plaintiff may file a writ of possession for the Premises and the Sheriff of Philadelphia County shall schedule the turnover of possession of the Premises to Plaintiff as soon as possible.

BY THE COURT,


NINA WRIGHT PADILLA, S.J.

220302719-Federal Realty Investment Trust Vs Rao 8 Inc. Etal



22030271900022

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FEDERAL REALTY INVESTMENT TRUST	:	March Term 2022
n/k/a FEDERAL REALTY OP, LP,	:	
Plaintiff,	:	No. 2719
v.	:	
RAO 8 INC. d/b/a DUNKIN DONUTS, MITAL	:	COMMERCE PROGRAM
H. RAO and RADHA M. RAO,	:	
Defendants.	:	Control Number 22044459
	:	

OPINION

Presently before the court is defendants RAO 8 Inc. d/b/a Dunkin Donuts (“Tenant”) and Mital H. Rao and Radha M. Rao’s (“Guarantors”) Petition to Open Judgment in Confession for possession of the leased premises and for money. For the reasons discussed below, the Petition to Open is Denied.

BACKGROUND

Plaintiff Federal Realty Investment Trust n/k/a Federal Realty OP, LP (“Landlord”) is the owner of real property located at 9173 E. Roosevelt Boulevard, Philadelphia, PA 19114 which includes Store #37 (referred to as “Store #37” or “Premises”) within the Northeast Shopping Center. On January 27, 2010, Landlord entered into a Lease for Store #37. On September 23, 2010, the Lease was assigned to Tenant. The Lease Agreement contains confession of judgment provisions. Guarantors agreed to guarantee the Lease Agreement obligations and executed a Guaranty Agreement on September 23, 2010. The Guaranty Agreement contained a confession of judgment provision.

The Lease required Tenant to pay minimum rent in the amount of \$9,300 on the first day of each month and additional rent which included real estate taxes, occupancy taxes and common area maintenance charges each month. Tenant’s monthly rent obligation was \$10,061.65.

Per the terms of the Lease Agreement, Tenant was required to use the premises as a Dunkin Donuts. The Lease Agreement was for a term of ten years with an option to extend the term for one additional period of five years. The Option to Extend states the following:

Tenant may exercise such option by giving Landlord Notice of its intent to exercise said option, such Notice to be received by Landlord at least twelve (12) months prior to the expiration of the original Term.

At the time of the exercise, Tenant (i) is not in Default, and (ii) is operating a business in the Leased Premises in accordance with the Permitted Use....

All other terms and conditions of this Lease shall remain unchanged and apply during the Option Period except that Minimum Rent shall be set forth below:

<u>LEASE YEAR</u>	<u>ANNUALLY</u>	<u>MONTHLY</u>
11-12	\$131,688.00	\$10,974.00
13-15	\$139,589.28	\$11,632.44

If any such option is not timely exercised, Tenant's right to exercise shall expire and the Lease shall terminate at the end of the original Term. ...¹

On September 13, 2019, Tenant sent a letter to Landlord notifying it that Tenant was electing to exercise its option to extend the Lease as provided in Addendum V of the Lease Agreement for an additional term of 5 years.²

The Lease Agreement in § 17.01 Notice states in pertinent part:

Any demand, request, approval, consent or **notice** (singularly and collectively, "Notice") given by one party to the other shall be in writing and addressed to the parties at their respective addresses as set forth in Section 1.01 and served by (1) national recognized overnight courier or (ii) registered or certified mail return receipt requested...³ (emphasis added).

¹ Lease Agreement dated January 27, 2010, Addendum V Option to Extend attached to the Complaint in Confession of Judgment as Exhibit "A".

² Letter dated September 13, 2019 Notice to Exercise Lease Option attached as Exhibit "2" to Defendants' Petition to Open.

³ Lease Agreement dated January 27, 2010 attached to the Complaint in Confession of Judgment as Exhibit "A"- §17.01 Notice.

The September 13, 2019 letter was not sent by overnight courier nor by registered or certified mail return receipt requested.⁴ Landlord states that it did not receive the September 13, 2019 letter.⁵

On January 23, 2020, Landlord sent Tenant a renewal proposal for Space # 37 at the Northeast Shopping Center.⁶ The Proposal was for a term of five years with starting rent for the first year to be \$114,936.85 with a monthly rent of \$9,578.07. This amount did not include additional rent. The Proposal states the following:

This proposal represents some of our understanding about a possible future Lease and is not intended to create a legally binding obligation on either party. Such an obligation will be created only when both parties execute a formal Lease, covering all of the rights and obligations of the parties, which is then delivered by and between us. If a formal Lease is not signed, neither party will be liable to the other under this document or as a result of any preliminary negotiation. **Please note that the terms of this proposal are valid for a period of ten (10) business days from the date above.** (emphasis in the original).⁷

This proposal was not accepted by the Tenant.

From August 2020 to October 8, 2021, Landlord and Tenant were in negotiations regarding renewing a Lease for Store #37, but a meeting of the minds never occurred.⁸ On September 23, 2020, the Lease Agreement terminated for Store #37, but Tenant remained in

⁴ See, Defendants' response in opposition to Plaintiffs' Praecipe to Supplement filed on July 12, 2022 ¶ 21 ("Defendants did not use a nationally recognized overnight courier service or certified mail return receipt.").

⁵ See, Plaintiff's response to Defendants' Petition to Open Confessed Judgment filed on May 23, 2022 ¶ 7 ("...the Plaintiff did not receive the purported notice to extend the Lease term...").

⁶ See, Proposal dated January 23, 2020 attached to Defendants' Petition to Open Confessed Judgment as Exhibit "3".

⁷ Id.

⁸ Emails dated August 5, 2020 to October 8, 2021 attached to Defendants' response in opposition to Plaintiff's Supplemental Brief, Exhibit "1".

possession of the premises and continued to pay the same monthly rent required by the expired Lease Agreement. Per the Lease Agreement, Tenant became a “Holdover Tenant” with a tenancy at will. Section 3.02 of the Lease Agreement provides in pertinent part as follows:

If a Tenant fails to vacate the Leased Premises on the Termination Date, Landlord shall have the benefit of all provisions of law for speedy recovery of possession of the Leased Premises and for damages (including business lost business). Occupancy after the Termination date (“Holdover Occupancy”) shall be a tenancy at will, and shall be subject to all terms, covenants, and conditions of the Lease, except that the daily Minimum Rent for each day that Tenant holds over (Holdover Minimum Rent”) shall equal one and one half (1-1/2) times the daily Minimum Rent payable in the last Lease Year.⁹

On November 10, 2021, Landlord sent Tenant notice via Federal Express that its right to possession of the Leased Premises was terminated as of December 31, 2021.¹⁰ Landlord has a new tenant ready to take over the space beginning August 4, 2022.

On March 25, 2022, Landlord filed a complaint in confession of judgment in the amount of \$101,553.27¹¹ and for possession of the premises. On April 25, 2022, Tenant filed a Petition to Open the Judgment. On May 23, 2022, Landlord filed a response to the Petition to Open and subsequently filed a supplement to its response. Tenant replied. This matter is now ripe for consideration.

⁹ Lease Agreement dated January 27, 2020 attached to the Complaint for Confession of Judgment as Exhibit “A” § 3.02- Holding Over.

¹⁰ Letter dated November 10, 2021 attached to the Complaint for Confession of Judgment as Exhibit “E”.

¹¹ This amount represents the following:

Minimum Holdover Rent (\$152.88 @ 541 days)* - \$82,708.08
Interest at 12% per annum from and including 10/1/2020- \$14,709.79, and
Attorney’s Fees (5% per the Assignment)- \$4,135.40.

*This figure represents the difference between the daily minimum rent (\$305.75) paid by Tenant for the holdover occupancy and the Holdover Minimum Rent amount (\$458.63) due under the Lease Agreement. See, Complaint in Confession of Judgment ¶ 43.

Discussion

Tenant filed a Petition to Open Confessed Judgment.¹² A petition to open a confessed judgment is an appeal to the equitable powers of the court.”¹³ The court may open a confessed judgment “if the petitioner (1) acts promptly, (2) alleges a meritorious defense, and (3) can produce sufficient evidence to require submission of the case to a jury.”¹⁴ To establish a meritorious defense, a petitioner must produce evidence supporting its claim.¹⁵ The evidence must show a sufficient basis for an issue to be submitted to a jury, but the petitioner need not prove that it will prevail at trial.¹⁶ The standard of sufficiency when reviewing the merits of a proposed defense is similar to the standard for a directed verdict, in that the court must view the facts most favorably to the moving party, accept as true all the evidence and proper inferences in support of the defense raised, and must reject all adverse allegations.¹⁷

At issue here is whether the term of the Lease Agreement was extended and whether Tenant is in default. Leases are contracts. As in the case of other written contracts, the purpose in interpreting a lease is to ascertain the intention of the parties which is to be gleaned from the language of the lease. Such intention is not to be determined merely by reference to a single

¹² Relief from a judgment by confession may be requested by filing a petition to open and/or strike a judgment. See, Pa. R. Civ. P. 2959 (a)(1). Here, Tenant’s petition only seeks to open the judgment by confession.

¹³ *Neducsin v. Caplan*, 121 A.3d 498, 504 (Pa. Super. 2015).

¹⁴ *Id.* at 506 (citation and emphasis omitted).

¹⁵ *Gur v. Nadav*, 178 A.3d 851, 858-59 (Pa. Super. 2018).

¹⁶ *Id.* at 858

¹⁷ *Michael’s La Veranda, Inc. v. Riverstone Riverfront, Inc.*, 2022 WL 34784, at *9 (Pa. Super., 2022) citing *Pops TT, LP v. R&R Restaurant Group, LLC*, 208 A.3d 79, 86 (Pa. Super. 2019).

word or phrase, but rather by giving every part of the document its fair and legitimate meaning. Where the terms of a lease are not ambiguous, the interpretation and construction are for the court, and the court must determine the intention of the parties from the language of the lease alone.¹⁸

Tenant argues that the confessed judgment should be opened because it exercised the option to extend the lease term by letter dated September 13, 2019. While Tenant did send a letter notifying Landlord of its intent to exercise the option in the Lease, the Notice was not sent as required by the Lease Agreement, that is by nationally recognized overnight courier, or registered or certified mail return receipt requested. Moreover, notwithstanding Tenant's failure to comply with the Lease Agreement's Notice requirements, there is no evidence in the record that Landlord received the September 13, 2019 Notice to extend the lease term, accepted Tenant's option to exercise the extension or renewed the Lease. Rather, the evidence demonstrates that the option to extend was never exercised. Landlord sent Tenant a Lease renewal proposal in January 2020 which required Tenant's acceptance. If the option to renew was received by Landlord and/or accepted, there would have been no need for Landlord to send Tenant a proposal for Lease renewal for the Premises with an acceptance requirement. Similarly, if the option to extend the Lease was properly exercised and accepted, there would have been no need to engage in negotiations for a new lease.¹⁹ Unfortunately, while the parties tried to reach

¹⁸ *Cusamano v. Anthony M. DiLucia, Inc.*, 281 Pa. Super. 8, 13, 421 A.2d 1120, 1122, (1980)(citations omitted.).

¹⁹ See Defendants' Response in Opposition to Plaintiff's praecipe to supplement, Exhibit "1"-Email dated September 22, 2020 from Landlord to Tenant ("Really need to know what the plan is with Dunkin at Northeast? I had thought you were going to be responding to the attached proposal but haven't heard back from you...").

an agreement, there were too many challenges as acknowledged by Tenant on September 24, 2020:

“...we also appreciate your help in trying to see if a deal can be made, but we also realize that this is not an easy task. If you feel that this is a difficult request to accomplish, please let us know as currently, we have marked this location for closing by the end of the current term. We don’t want to change all our subsequent plans for closure, as there are many steps that have to be accomplished and require a great deal of planning. Only put energy into this if there is a possibility as you know your side of the table better than us, and we don’t want to waste your time....”²⁰

The fact that Tenant continued to pay rent and Landlord continued to accept rental payments from Tenant after the Lease Agreement terminated does not evidence an extension of the existing lease or the creation of new lease. After the Lease for the premises terminated, Tenant became a holdover tenant by operation of §3.02 of the Lease Agreement and Landlord was entitled to collect rent.²¹ Therefore, any rent paid by Tenant during the holdover occupancy was due to Landlord because Tenant remained in possession of the premises after the Lease expired.

Tenant also argues in support of its petition to open that it is not in default. This court disagrees. Tenant remains in possession of the premises even though Landlord terminated its holdover occupancy effective December 31, 2021. Additionally, Tenant per the Lease Agreement, was required to pay Landlord “daily Minimum Rent for each day that Tenant holds over (“Holdover Minimum Rent”)” in an amount equal one and one-half (1-1/2) times the daily Minimum Rent payable in the last Lease Year.²² Tenant only paid sums equivalent to minimum

²⁰ Id.

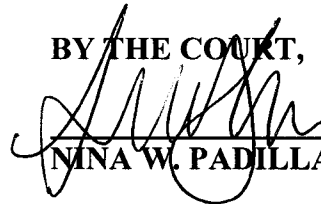
²¹ See, Lease Agreement § 3.02 Holding Over.

²² See, Lease Agreement § 3.02 Holding Over.

rent it paid to Landlord during the Lease term. Tenant did not pay any Holdover Minimum Rent and therefore is in default.

CONCLUSION

For the foregoing reasons, the Petition to Open the Confessed Judgment is Denied. Defendants shall **VACATE** the premises at 9173 E. Roosevelt Boulevard, Philadelphia, PA, 19114, Store #37 in the Northeast Shopping Center (the "Premises") within thirty (30) days. If Defendants fail to Vacate the Premises within thirty (30) days, Plaintiff may file a writ of possession for the Premises and the Sheriff of Philadelphia County shall schedule the turnover of possession of the Premises to Plaintiff as soon as possible.

BY THE COURT,


NINA W. PADILLA, S.J.