IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

SAVOY HOSPITALITY, LLC d/b/a Melting Pot Restaurant, *et al.*,	)	**Case No. CI-2011-02783**
	)	**Judge John P. O'Donnell**
Plaintiffs,	)	
v.	)	**JOURNAL ENTRY**
5839 MONROE STREET ASSOCIATES, LLC. d/b/a Monroe Associates, LLC,	)	
Defendant.	)	

John P. O'Donnell, J:

STATEMENT OF THE CASE

This is a lawsuit by a commercial tenant, a restaurant, against its landlord alleging breach of contract. The defendant landlord counterclaimed for breach of contract. The lawsuit was filed on April 13, 2011. On October 25, the parties reached a written settlement agreement. On January 19, 2012, the plaintiffs filed a motion to enforce the settlement agreement. The court granted that motion by an entry journalized on April 11, but ordered that a hearing was necessary to determine the scope of the parties' remaining rights and obligations under the settlement agreement. That hearing took place on May 1, 2012, and this entry follows.

STATEMENT OF THE FACTS

The plaintiffs are Savoy Hospitality, LLC and its two members, Myron and Nicole Duhart.[1] In October, 2007 Savoy signed a ten-year lease of the building at 5839 Monroe Street, Sylvania, with the building's owner, defendant 5839 Monroe Street Associates, LLC.[2] At that address Savoy operated a franchise of the restaurant known as The Melting Pot. The Duharts each personally guaranteed the lease.

On April 13, 2011 Savoy filed the complaint in this case alleging that Monroe knew before the lease was executed that the foundation of the building was defective to the point of rendering the premises unusable for a restaurant yet never disclosed the condition to Savoy and, once Savoy discovered the defect, never repaired the condition as required by the lease. Although the complaint has two causes of action for declaratory judgment at counts one and three, the gravamen of the complaint is contained in count two's breach of contract claim.

The defendant's first amended counterclaim, filed August 17, 2011, included claims for breach of the lease, breach of the guarantees, unjust enrichment and eviction. But before a hearing on the request for eviction the parties reached a settlement agreement, which was signed October 25, 2011. The settlement agreement – and a later stipulated injunction – provided that Savoy would vacate the premises by December 1, 2011. Those agreements made the eviction moot, but the defendant alleges that before Savoy moved out it removed and took fixtures from the premises. Therefore, a second amended counterclaim added a cause of action for conversion.

In this case, the settlement agreement is more than four single-spaced pages and is signed by all parties. The contract includes monetary terms at paragraphs 2 and 5. Another

[1] Unless a distinction is necessary, the plaintiffs/counterclaim defendants will be referred to in this entry as Savoy. Additionally, Nicole Duhart has been the limited liability company's sole member since about January, 2011.
[2] The defendant/counterclaim plaintiff will be referred to in this entry as Monroe.

term, at paragraph 10, provides that Monroe "shall conduct a physical examination of the Premises" after Savoy is gone "to determine items of repair and replacement" and then notify the plaintiffs of those things that need to be repaired or replaced. The agreement further provides:

> [The plaintiffs] agree to provide at their expense all labor and materials necessary to repair or replace any defective conditions identified in the inspection, excepting reasonable wear and tear. . .*If [the plaintiffs] fail or refuse to make any such expenditure or perform any such repair or replacement, Monroe Associates may seek and secure specific performance* through appropriate legal proceeding or may implement such repair, replacement or remediation for which [the plaintiffs] agree, jointly and severally, to reimburse Monroe Associates for such costs. If [the plaintiffs] fail or refuse to timely reimburse Monroe Associates as required by this Paragraph, then Monroe Associates shall be entitled to commence appropriate legal proceedings for such monetary damages, and [the plaintiffs] agree, jointly and severally, to pay Monroe Associates' costs of collection, including without limitation attorneys' fees.
>
> Once any repairs replacement or remediation, if any, have been performed and paid for, the Parties shall execute and file a Stipulation of Dismissal With Prejudice. (Emphasis *in italics* added.)

Savoy was out of the premises by November 30, 2011, as required by the settlement agreement. By then, the plaintiffs' entire financial obligation under the settlement contract – payments totaling $55,000 – had been satisfied, with the exception of a water/sewer bill for $1,189.75 that was due December 20. Thereafter, the defendant undertook the inspection described in paragraph 10.

After that inspection, on December 16, Monroe, through its counsel, sent a letter to Savoy's counsel enumerating the conditions at the building which required repair or replacement under paragraph 10. That letter was introduced at the hearing as defendant's exhibit 6 and it lists the following:

1. Replacement of all light fixtures and switches;

2. Reinstallation of the wine display, including glass panels, to its original condition;

3. Relocation of the bar back to its original location;

4. Replace any hood ventilation units;

5. Replace any countertops, shelving, cabinetry, casework shadowboxes, and other similar fixtures;

6. Replace any walk-in refrigerator or freezer units;

7. Premises were left in filthy condition and need to be returned to broom-clean condition;

8. Replace all ceiling tiles which were removed;

9. Replace dishwasher system;

10. Replace tables in bar area and on patio;

11. Broken water line needs to be fixed, as well as all resulting water damage due to broken line being left running;

12. Awnings were removed and need to be replaced;

13. Music system needs to be replaced; and

14. Carpet was removed and needs to be replaced.

Plaintiff Myron Duhart testified at the hearing about the items on this list. Generally summarizing his testimony, the conditions fall into three categories: those that have been remedied; those that the defendant was never entitled to; and those that the plaintiffs concede still need to be done.

As for conditions that have been remedied, Duhart testified that the wine display has been reinstalled (item number 2), the bar has been moved to its original location (item number 3), the dishwasher hood ventilation unit has been reinstalled (item number 4), and all but a few ceiling tiles have been replaced (item number 8). Duhart concedes that if there are a few

ceiling tiles still missing then the defendants must replace them, if they were missing before December 1, 2011.

As to items that the plaintiffs agree remain undone, Duhart testified that there are three or four light fixtures toward the "lovers' lane" area in the back of the restaurant that the plaintiffs should replace (item number 1). However, as for other "can lights" that were removed, Duhart testified that those lights are "proprietary" and were allowed to be removed under the settlement agreement because of the lien waivers discussed below. As for light switches, Duhart did not agree that any were taken, but acknowledges that if they were, they should be returned or replaced. As for item number 7, Duhart conceded that the plaintiffs did not leave the restaurant in a "broom clean" condition.

For the remainder of the items on the defendant's demand list, Duhart testified that the plaintiffs are not required to accomplish them because they were never within the contemplation of the parties when the settlement agreement was signed. In support of that assertion, the plaintiffs produced hearing exhibits A and B, two lien waiver contracts between the parties that were entered into in conjunction with the lease. The first agreement is captioned "landlord rider" and the second is captioned "landlord agreement."

Monroe agreed to the landlord rider knowing that it was insisted upon by Savoy's franchisor, The Melting Pot Restaurants, Inc. By the rider, at paragraph number 6, Monroe agreed to waive "lien rights for" 15 categories of Melting Pot equipment or fixtures listed in sub-paragraphs 6(a) through 6(o).[3] Duhart summarized this list as items that are "proprietary" to The Melting Pot, many of which bore a Melting Pot logo.

Monroe agreed to the landlord agreement knowing that it was insisted upon by Savoy's lender, UPS Capital Business Credit. The agreement describes UPS's collateral for the loan to

[3] Plaintiffs' hearing exhibit A, landlord rider, pages 1-2.

Savoy as "all property" subject to a security agreement between Savoy and UPS, including "all furniture, removable trade fixtures, removable kitchen equipment, dining tables and booths" and all substitutions for any such equipment.[4] By the agreement, Monroe acknowledged that the collateral "shall be deemed to be personal property of [Savoy] and not a fixture or part of the Premises" and agreed to waive any right it might otherwise have as to any of the collateral.[5]

These lien waivers created exceptions to Section 6(b) of the parties' lease, which provides that all of the tenant's "improvements shall, upon installation, immediately become the property of the landlord and, upon termination of this lease, shall remain upon and be surrendered with the leased premises."[6]

LAW AND ANALYSIS

When the parties to a lawsuit have entered into a binding settlement agreement, the trial court has the authority to enforce that settlement. *Tabbaa v. Koglman*, 149 Ohio App.3d 373, 2002-Ohio-5328, ¶ 29 (8th Dist.). Settlement agreements are contractual in nature and, as such, basic principles of contract law apply. A valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and an acceptance thereof. *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376. Additionally, the terms of the settlement agreement must be reasonably certain and clear. *Id.*

The nub of the current dispute is the parties' inability to agree that the undone items on the inspection list are the plaintiffs' responsibility, so the motion to enforce the settlement agreement is, in essence, a request for declaratory judgment asking the court to declare the rights and obligations of the parties under the contract. A proceeding so postured was within the contemplation of the parties at the time of the contract since, first, a declaratory judgment

[4] Plaintiffs' hearing exhibit B, landlord agreement, first page of two unnumbered pages.
[5] *Id.*
[6] Plaintiffs' hearing exhibit D, lease, p. 5.

action is normally available to the parties to a contract and, second, a declaratory judgment action by the plaintiffs is the other side of the coin to an action by the defendant for specific performance that the contract provides as a remedy for a breach by the plaintiffs. Hence, this dispute is properly before the court.

But before considering the merits of the competing claims, the defendant's claim that the entire agreement has failed and is unenforceable for want of substantial performance by the plaintiffs must be addressed. The evidence showed that the plaintiffs' counsel was notified by email of the water/sewer bill on December 6, 2011 but that the plaintiffs did not reimburse the defendant for the bill until the end of February, 2012. The defendants claim that the tardy payment breached the plaintiffs' agreement to pay the utilities and that, because they did not substantially perform their obligations, the plaintiffs should be prevented from enforcing the contract.

Paragraph 5 of the settlement contract provides that the plaintiffs "promise to pay all utilities during" their possession. There is no requirement that the bills for the utilities must be paid by a certain date or within a certain amount of days after being billed, so the plaintiffs can't be said to have failed to perform a specific obligation. As Duhart testified, Savoy reimbursed Monroe for the bill as soon as he, not his lawyer, knew of it. Additionally, even if consent by the plaintiffs to pay the utility bill by its due date can be read into the contract, the late payment by Savoy of 2.1% of its payment obligations under the agreement can hardly be categorized as a failure to substantially perform. Hence, the plaintiffs are not barred from having the contract enforced.

As for the plaintiffs' obligations under Paragraph 10, the defendant's position is that the plaintiffs' agreement "to provide at their expense all labor and materials necessary to repair or

replace any defective conditions identified in the inspection" requires them to remedy *any* condition identified by the defendant's inspection, without limitation. That interpretation, however, ignores the other written agreements between the parties, namely the landlord rider and landlord agreement. The defendant was well aware that much of the equipment and other property the plaintiffs brought to the premises were either proprietary to The Melting Pot Restaurants, Inc. or collateral of UPS Capital Business Credit, and there is no evidence that the parties intended to override the defendant's lien waivers when they agreed to the settlement. In considering the rights and obligations of the parties, then, the court must take into account whether the various items the defendant wants to be returned or replaced are the defendant's property under section 6(b) of the lease or were exempted from that section by the landlord rider or landlord agreement.

Turning to the items on the defendant's inspection list, as noted above the evidence shows that the plaintiffs have discharged entirely their obligations as to item numbers 2, 3 and 4. As to item number 8, the ceiling tiles, the only evidence before the court is Duhart's testimony that they were replaced, albeit with the admission that a few might have been left unreplaced. But despite that admission, there is no evidence sufficient to allow the court to conclude that there actually are ceiling tiles that still need to be replaced and, if so, how many. Therefore, the court finds that the plaintiffs' obligation to replace ceiling tiles has been satisfied.

As to item 1 – replacement of all light fixtures and switches – the plaintiffs concede that lights in the "lovers' lane" part of the restaurant were unjustifiably removed and should be replaced. The plaintiffs are therefore ordered to replace those light fixtures. As for light switches in the walls of the restaurant, the court finds that they are not exempted from section

6(b) of the lease by the landlord rider or landlord agreement and should remain in the restaurant. The evidence – particularly defendant's exhibit 11, a photograph of electrical switches or boxes pulled from the wall – shows that switches were removed and the plaintiffs are therefore ordered to replace them.[7]

As to inspection item 5, the court finds that the countertops, shelving,[8] cabinetry and casework shadowboxes are property that is included in the definition of collateral in the landlord agreement. Hence, the plaintiffs are not obligated to return any property of this kind that was removed.

Item 6 on the defendant's list is "replace any walk-in refrigerator or freezer units." The court finds that the walk-in refrigerator is included in the definition of collateral and that Savoy was entitled to remove it despite it being connected to the premises by adhesive. However, the plaintiffs did not remove the entire unit. Therefore, the plaintiffs are ordered to remove, at their expense, the remaining components of the "floating" (to use Duhart's description) walk-in refrigerator.

The removal of the rest of the refrigerator should be accomplished in connection with cleaning the premises, item 7 on the defendant's inspection list. Duhart acknowledged that the premises were left less than tidy, and the plaintiffs are ordered to make the premises "broom clean." Specific items that should be accomplished during the cleaning are: recessing the electrical wires shown in defendant's exhibits 10 and 12, as well as any similar hanging wires throughout the building; installing an electrical box with a cover at the location shown in defendant's exhibit 14; disposing of, or moving to the storage room, the pile of wood trim

[7] Since any new tenant is likely to use different lighting accessories, the defendant may agree that this order can be satisfied if the plaintiffs reinstall switch boxes, cap the wires, and cover the boxes. That will eliminate the likelihood of the next tenant removing and discarding the switches the plaintiffs reinstall.

[8] Duhart testified that some shelves near the bar were mistakenly removed but have been returned.

shown in defendant's exhibits 15, 16 and 19; and capping the wires shown in defendants' exhibit 20 and any similarly exposed wires protruding from the floor. Generally, the cleaning should include washing, sweeping or vacuuming floors as needed, especially the floor in defendant's exhibit 24.

As to item 9, the dishwasher system, the evidence showed that it was rented by the plaintiffs from ECOLAB and never became an improvement that was property of the landlord under section 6(b). The plaintiffs had a right to remove it and are not obligated to return or replace it.

As to item 10, the court finds that the tables were covered by the landlord rider or the landlord agreement, or both, and need not be returned.

As to item 11, no evidence was offered sufficient to allow the court to even conclude that a broken water line exists, much less that it occurred during the plaintiffs' occupancy. There is also no evidence of damages caused by any water leak and the defendant cannot refuse to stipulate to a dismissal of the lawsuit with prejudice on the basis of this claim.

Item 12 is "awnings were removed and need to be replaced." Indeed, Duhart testified that when Savoy's tenancy began, about nine cloth awnings over exterior windows were removed and replaced with awnings bearing Melting Pot insignia. The old awnings had a painted logo for Carson's Steakhouse and were thus essentially useless to any future tenant. Duhart said that they were kept for some time and made available to Monroe but were eventually disposed of when Monroe never claimed them. When Savoy vacated the premises the Melting Pot awnings were taken, with the existing metal frames left bare. The court finds that the old awnings were not abandoned by Monroe so as to justify throwing them out. Duhart testified that there was a room in the basement of the building that was used as storage for

things that belonged to the landlord. There was no reason the awnings couldn't have been put in that room, regardless of the plaintiffs' opinion that they were worthless. They should have been kept. Even if they are of no value to a future tenant they are of some value to the defendant in preserving the curb appeal of a building Monroe is now trying to lease. The plaintiffs are therefore ordered, at their expense, to install fabric awnings equivalent in quality to the discarded Carson's Steakhouse awnings.[9]

The defendant claims at item 13 that the "music system needs to be replaced." Duhart acknowledged that an old speaker system was there when Savoy moved in and that Savoy replaced it with a better, modern system which was removed when the plaintiffs vacated the premises. The old system is gone. The court finds that the stereo system installed by Savoy was collateral under the landlord agreement and Savoy was entitled to take it. However, like the old awnings, Savoy was not entitled to trash Monroe's existing system, even if it was old and cheap. Hence, the plaintiffs are ordered to install a stereo system of a kind and quality equivalent to what was there at the inception of the lease.[10]

The last inspection item is number 14, carpet replacement. The evidence on this subject is Duhart's testimony that Savoy installed carpet and none of it has been removed; any bare spots are places where there was never carpet in the first place, *e.g.* where booth walls were located. As a result, the plaintiffs are not obligated to replace any carpet.

CONCLUSION

By this entry the plaintiffs have been ordered to: replace light fixtures; replace light switches; take out the rest of the walk-in refrigerator; replace awnings and the speaker/stereo

[9] Nothing in this order prevents the parties from agreeing to the color of the awnings. If they can't, the awnings should be the same color – without a logo – as the Carson's Steakhouse awnings. If nobody can remember what that color was, then any awnings that match the building's exterior will do.

[10] Nothing in this order prevents the parties from agreeing to a monetary amount to satisfy any of Savoy's oblilgations.

system; and clean the premises. When all of these things have been accomplished, the defendant is ordered to return the plaintiffs' security deposit, whereupon the court will mark the entire lawsuit as dismissed with prejudice at the plaintiffs' costs. In the meantime, the defendant is free to cash the check remitted by the plaintiffs for the utility bill.

The plaintiffs' work is ordered to be substantially complete by June 22, 2012 and a telephone status conference is scheduled for Tuesday, June 26, 2012 at 2:00 p.m. Plaintiffs' counsel is ordered to initiate the conference by first connecting opposing counsel and then the court at 216-443-8698.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this _____ day of May, 2012, to the following:

Amy L. Butler, Esq.
abutler@ralaw.com
Anthony J. Calamunci, Esq.
acalamunci@ralw.com
Roetzel & Andress LPA
Attorneys for Plaintiff

Erik G. Chappell, Esq.
egc@lydenlaw.com
Julie A. Douglas, Esq.
jad@lydenlaw.com
Lyden Liebenthal & Chappell
Attorneys for Defendant

_____
Judge John P. O'Donnell