

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

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| ASHBURNER CONCRETE & MASONRY SUPPLY, INC. | : |
| | : |
| <i>Plaintiff</i> | : January Term, 2006 |
| | : |
| v. | : No. 2374 |
| | : |
| EMEDIO CAPPONI and ROSEMARIE CAPPONI, H/W | : Commerce Program |
| | : |
| <i>Defendants</i> | : Motion Control Nos. |
| | : 110292, 031402. |

ORDER

AND NOW, this 3RD day of May, 2007, upon consideration of the motion for summary judgment filed by Plaintiff Ashburner Concrete & Masonry Supply, Inc., the response in opposition and the motion to amend the pleading filed by Plaintiffs Emedio and Rosemarie Capponi, the respective memoranda of law in support and opposition, and Plaintiff's surreply motion for summary judgment, it is **ORDERED** that:

1. the motion for summary judgment filed by Plaintiff Ashburner Concrete & Masonry Supply, Inc. (control No. 110292), is **GRANTED**¹;
2. the motion to amend the pleading filed by Plaintiffs Emedio Capponi and Rosemarie Capponi (control No. 031402), is **DENIED**.

BY THE COURT:

HOWLAND W. ABRAMSON, J.

¹ A hearing is scheduled for 6/5/07 at 10:00 A.M. in courtroom 443, City Hall, to determine the reasonableness of Plaintiff's costs and expenses, including attorney's fees, and the amount of recoverable rents that Plaintiff paid, from the date of the proposed property settlement, to the present.

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OPINION

HOWLAND W. ABRAMSON, J.

Plaintiff-tenant moves for an Order directing Defendants-owners to sell their property pursuant to the provision in a Lease Agreement. This motion presents two issues: whether the Lease Agreement empowered tenant to exercise an option to buy the leased property, and, if so, whether the Lease Agreement was in effect when tenant exercised the option. For the reasons below, the court answers both questions affirmatively.

BACKGROUND

Plaintiff, Ashburner Concrete & Masonry Supply, Inc. (“Ashburner”), a manufacturer of concrete and a supplier of masonry products, leased real property at 4800 Ashburner Street, Philadelphia, Pa. (the “Property”), from Emedio and Rosemary Capponi (the “Owners”). The Lease Agreement (the “Lease”) provided for an initial term of five years, from 26 January 1996, to 31 December 2001, and for two consecutive option terms, each lasting five years, to begin at the expiration of the initial

term. The Lease also contained a provision titled “Right of First Refusal / Purchase Option.”

On 9 June 2005, Ashburner instituted a lawsuit against the Owners (the “1st Action”).² In the 1st Action, Ashburner sought to compel the Owners to install a water line that would comply with regulations, and to pay Ashburner for losses caused by a water shutdown. By counterclaim, the Owners asked the court to order Ashburner’s eviction for failure to pay rent.

While the 1st Action was pending, Ashburner notified the Owners that it would exercise its option to buy the Property for \$600,000, and informed the Owners about the date, time, and place, for settlement. In response, the Owners indicated that the Lease was null and void, and informed Ashburner that they would not sell. Following the Owner’s refusal, Ashburner filed the instant lawsuit (the “2nd Action”), on 18 January 2006. Less than six months later, the Court of Common Pleas, Philadelphia County, ruled on the 1st Action. The court awarded damages to Ashburner, found that the lease was “in full force and effect,” and directed Ashburner to “pay future rents under the lease directly to the [Owners] until the lease expires.”³ At present, Ashburner moves for summary judgment in the 2nd Action, and seeks specific performance, plus recovery of costs, expenses, and rents paid after the proposed settlement date.

DISCUSSION

A “court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be

² Ashburner Concrete & Masonry Supply, Inc. v. Emedio and Rosemarie Capponi and the City of Philadelphia, Case No. 0506-0528 (*appeal filed*).

³ Exhibit I to Ashburner’s motion for summary judgment.

established by additional discovery.”⁴ A court must view the record in the light most favorable to the non-moving party: all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.⁵ A court may grant summary judgment only where the right to such a judgment is clear and free from doubt.⁶

I. The Lease clearly and unequivocally provides an option to buy the Property.

Ashburner argues that the Lease clearly and unequivocally provides Ashburner with an option to buy the Property. The Owners contend that the option clause is ambiguous and unenforceable.

“The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties.”⁷ The intent of the parties is gleaned from the writing itself.⁸ Courts neither assume that contractual parties choose their language carelessly, nor that the parties ignore the meaning of the language that they use.⁹ The meaning of a clear and unequivocal contract is determined by its contents alone.¹⁰

The Lease recites:

1. Term. The term of this lease shall commence on January 26, 1996 and shall end on December 31, 2001 (the “Initial Term”). In addition, Tenant shall have the option to extend the term of this lease for two periods of five years each (the “Option Terms”)....

* * *

9. Right of First Refusal / Purchase Option.

(a) At any time during the Initial Term or any of the Option Terms,

⁴ Fine v. Checcio, 582 Pa. 253, 265; 870 A.2d 850, 857 (2005).

⁵ Id.

⁶ Id.

⁷ Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 590-591; 777 A.2d 418, 429 (2001).

⁸ Id.

⁹ Id.

¹⁰ Id.

Tenants shall have the right of first refusal to purchase the Premises.... [I]f Tenant ... elects [to purchase the Premises,] the purchase price ... shall be ...

- (ii) \$530,000 if the closing occurs on or before December 31, 1998;
 - (iii) with the purchase price increasing \$10,000 per year for each year thereafter....
- (b) At any time during the Initial Term or any of the Option Terms, Tenants shall also have the irrevocable option to purchase the Premises upon the same financial terms and conditions as set forth in paragraph 9(a) above.¹¹

The Lease clearly and unambiguously empowers Ashburner to buy the Premises: under paragraph 9(a), Ashburner may buy the Property if the Owners wish to sell; under paragraph 9(b), Ashburner may exercise the option to buy the Property regardless of the Owners' wishes. Furthermore, the Lease unequivocally states that the selling price shall be \$530,000 plus \$10,000 for each year after 31 December 1998. Under this mechanism the selling price would have been \$600,000, had settlement occurred no later than 31 December 2005. Ashburner properly exercised its option to buy the Property for \$600,000.

II. The lease was in "full force and effect" when Ashburner exercised its option to buy the Property.

The Owners contend that the Lease "was never renewed," and that it "expired on December 31, 2001"¹² The Owners argue that after the Lease expired, Ashburner could no longer exercise the option. This argument does not square with the findings of the Court of Common Pleas, Philadelphia County, in the 1st Action.¹³ In that action, the

¹¹ Exhibit B to Ashburner's motion for summary judgment.

¹² Defendants Emedio and Rosemarie Capponi's answer in opposition to Ashburner's motion for summary judgment, ¶ 40.

¹³ Ashburner Concrete & Masonry Supply, Inc. v. Emedio and Rosemarie Capponi and the City of Philadelphia, Case No. 0506-0528 (*appeal filed*).

Honorable Judge James M. Lynn found “that the subject lease [between the Owners and Ashburner was] in full force and effect.”¹⁴ It follows that while the Lease was in full force and effect, Ashburner was empowered to exercise the option to buy the Property.

III. Ashburner is entitled to recover rents paid after the date of the proposed settlement.

The Honorable Judge James M. Lynn also directed Ashburner “to pay future rents under the lease directly to the [Owners] until the lease expires.”¹⁵ Ashburner paid the rents and is entitled to recover the amounts tendered after the date of the proposed settlement.

IV. Landlord shall take back a purchase money mortgage on 90% of the Purchase price.

Ashburner contends that from the date of the proposed settlement to the present, the interest rate on a \$480,000 mortgage with Wachovia Bank rose from 7.22% to 7.5%. Ashburner seeks to capture this difference in the amount of \$41,195. This argument does not square with the language in the Lease. Paragraph 9(a) of the Lease states that “[t]he terms of the purchase shall be as follows: Tenant shall place 10% down and the remaining 90% shall be financed by Landlord taking back a purchase money mortgage which constitutes a first lien on the Premises.”¹⁶

The clear and unambiguous language shows that 90% of the purchase price, or \$540,000, minus the amounts of rent paid after the proposed settlement, must be financed by the Owners who shall take back a purchase money mortgage as a first lien on the Property.

¹⁴ Exhibit I to Ashburner’s motion for summary judgment.

¹⁵ Exhibit I to Ashburner’s motion for summary judgment.

¹⁶ Exhibit B to Ashburner’s motion for summary judgment.

- V. Ashburner is entitled to recover costs and expenses, including reasonable attorney's fees.

Paragraph 7(a) of the Lease states:

Default by Landlord. In the event of a default by Landlord, Tenant may, but shall not be obligated to, take such action as is necessary to cure the default for and on behalf of Landlord, and the cost and expenses so incurred, including reasonable attorney's fee's, may be deducted from the rent and other charges due to Landlord under this Lease.

This clear and unambiguous language leaves no doubt: the parties intended to provide Tenant with the option to recover costs and expenses, including reasonable attorney's fees, in the event of a default by the Landlord.

BY THE COURT:

HOWLAND W. ABRAMSON, J.