IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

1550 MP Road LLC, Plaintiff, vs. Teamsters Local Union No. 700, International Brotherhood of Teamsters, Joint Council 25 of the International Brotherhood of Teamsters, Kenneth Brantley, Randy Cammack, Thomas Clair, John Coli, John Falzone, Patrick W. Flynn, Fred Gegare, James T. Glimco, Michael Haffner, Ken Hall, Terrence J. Hancock, Carroll E. Haynes, James P. Hoffa, John Hurley, Thomas C. Keegel, Michael Marcatante, Brian Meidel, Frederick P. Potter, Jr., Brian Rainville, Fred Simpson, Thomas Stiede, Becky Strzechowski, and George Tedeskchi, Defendants.	No. 10 L 5979 Calendar S Judge Raymond W. Mitchell

ORDER

This case is before the Court following a lengthy bench trial with the parties present in person and through counsel, testimony taken and concluded with the Court having admitted certain exhibits into evidence and having heard arguments advanced on behalf of the parties. In making this judgment, the Court has reviewed its notes and the exhibits offered and received into evidence; it has listened to the witnesses and observed their manner and demeanor while testifying; and the Court has considered witnesses' testimony in light of all the relevant admissible evidence.

Findings of Fact

Plaintiff 1550 MP Road is an Illinois limited liability company that owns commercial property in Cook County. Teamsters Local Union Number 726 is a dissolved labor organization that operated in Illinois. Defendant International Brotherhood of Teamsters is a labor organization comprised of numerous local labor

unions. Defendant Teamster Local Union Number 700 is a labor organization operating in Illinois.

In response to an inquiry from Local 726 looking for new space to house its offices, Plaintiff showed various properties to the Local's leadership. After they settled on one property (1550 Mount Prospect Road), Plaintiff purchased the property for $800,000 and proceeded to build out the property to the Local's specifications. In May 2008, Plaintiff's Manager Matthew Friedman and Local 726's Secretary Treasurer Thomas Clair entered into a lease-purchase agreement for the property. The terms of the agreement were negotiated between Friedman, Clair, Plaintiff's Co-Manager Mick Bess, and union member John Diaz, and the written contract was prepared by Plaintiff's attorney Jeffrey Rochman. Under the contract, Local 726 leased the property for five years. If Local 726 did not purchase the property by the end of the fifth year, it was required to pay an amount equal to 200% of the base rent for ten years.

Local 726 took possession of the property in January 2009 and paid rent until August 2009.

Separately, after an unrelated investigation into Local 726 revealed certain irregularities, Defendant IBT's General President imposed an emergency trusteeship over Local 726 in August 2009. Trustee Becky Strzechowski disputed the validity of the lease and refused to pay the August rent. From September to November, Plaintiff and Local 726's trustees attempted to reach a new lease agreement. In early December, Plaintiff learned that Local 726 was going to be dissolved. Plaintiff and Local 726's trustees continued to negotiate, but ultimately failed to agree.

On December 31, 2009, IBT's General Executive Board dissolved Local 726 and another labor organization, Local 714. Defendant Local 700 was chartered that same day, and the memberships for Local 726 and Local 714 were transferred to Local 700. Local 726's assets and liabilities were also transferred to Local 700, which initially operated a temporary trusteeship.

Local 700 occupied the property at 1550 Mount Prospect from January 2010 to April 30, 2010. Local 700 vacated the property at the end of April. In May 2010, Plaintiff served Local 700 with a notice of default demanding rent payments. Local 700 did not respond, so Plaintiff terminated the lease.

Plaintiff filed a 22-count verified complaint, claiming damages related to Local 700's alleged failure to perform under the lease. Count I alleges breach of contract against Local 700 under a theory of successor liability. Counts II and III allege violations of the Uniform Fraudulent Transfer Act against Local 700. The remaining counts allege tortious interference with contract claims against IBT,

Joint Council 25, and individual members of the IBT General Executive Board or Joint Council 25 (collectively "the IBT Defendants").

Conclusions of Law

A. Validity of the Lease

The first issue is whether the lease between Plaintiff and Local 726 was valid and enforceable. Local 726's liability, and hence Local 700's liability, to Plaintiff rests on whether Local 726 was bound by and breached the terms of a valid and enforceable contract. Whether the lease between Local 726 and Plaintiff was valid and enforceable depends on several sub-issues including (1) whether Secretary Treasurer Thomas Clair had authority to enter into the contract on Local 726's behalf; (2) whether the statute of frauds is a defense to Plaintiff's claim; and (3) whether an executive board resolution was a condition of the lease.

Clair's Ability to Enter into the Lease

Under Local 726's bylaws, both the Secretary Treasurer and President were required to sign all contracts entered into on behalf of Local 726. Thus, Clair did not have express authority to enter into the lease by himself. Clair had the power to bind Local 726 under the agreement, however, if he acted with apparent authority. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 34. Apparent authority "is the authority which a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess." *Id.* Where a principal has created the appearance of authority in an agent, and another party has reasonably and detrimentally relied upon the agent's authority, the principal cannot deny it. *Id.*

Testimony shows that Clair had apparent authority to sign new leases without votes from the membership or authorization from the Executive Board. Two members of the Executive Board testified to Clair's authority to sign new leases, and Clair signed Local 726's prior lease, which the Local fully performed, by himself. Although Plaintiff may have "received" a copy of the Local's bylaws, the Defendants have not shown that Plaintiff had actual knowledge of the provision regarding lease authorization. Friedman testified that he had never reviewed the governing documents for any entity that he worked with in his long real estate career.

Clair's apparent authority is further supported by the Executive Board's "Unanimous Consent Resolution," which appears to expressly authorize and ratify Clair's actions with respect to the lease. The consent resolution demonstrates that Local 726 held out Clair as having the authority to enter into the lease on his own.

Thus, Plaintiff reasonably relied on Clair's apparent authority when negotiating and executing the lease.

In addition to creating an appearance of authority, the Executive Board ratified the lease. Ratification, which may be express or inferred, "occurs where a principal attempts to seek or retain the benefits of the transaction." *Hofner v. Glenn Ingram & Co.*, 140 Ill. App. 3d 874, 883 (1st Dist. 1985). The consent resolution signed by the Executive Board specifically mentions the lease and authorizes Clair's actions. While not all members signed the resolution, there was still a majority in its favor. More importantly, Local 726 moved into the property and paid rent for seven months without any objection by the Executive Board or the membership, thereby retaining the benefit of the parties' agreement.

Statute of Frauds

Local 700 also challenges the validity of the lease under the statute of frauds, arguing that Clair, as Local 726's agent, needed written authorization to enter into the lease. The statute of fraud provides that "[n]o action shall be brought to charge any person upon any contract for the sale of lands . . . unless such contract . . . shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 740 ILCS 80/2. Local 700 did not plead the statute of frauds as an affirmative defense, so the argument is waived. But even reaching the merits, the argument has no moment.

The purpose of the statute of frauds is not to enable parties to "repudiate contracts that they have in fact made." *Haas v. Cravatta*, 71 Ill. App. 3d 325, 329 (2d Dist. 1979). There is no doubt that Local 726 entered into and intended to be bound by the lease. Moreover, "the statute of frauds was not designed or intended to afford an opportunity for escape from the fundamental principle that no one shall be permitted to found a claim upon his own iniquity or take advantage of his own wrong." *Loeb v. Gendel*, 23 Ill. 2d 502, 504 (1961). Local 726 failed to follow the specifics of its own bylaws, and now it is attempting to use its failure to take advantage of the statute of frauds, despite clearly accepting and performing under the contract for several months. Plaintiff should not be punished for Local 726's failure to obtain proper written authorization for Clair's actions. Plaintiff asked for and reasonably relied on the consent resolution, which purportedly authorized the lease. To permit Local 700 to use the statute of frauds in this case on these facts would perpetrate a fraud–not avoid it.

Even if the statute of frauds was an appropriate defense, the consent resolution satisfies the statute. If an agent's signature is unauthorized, the statute of frauds is satisfied where the principal later ratifies the agent's actions in writing. *Prodromos v. Poulous*, 202 Ill. App. 3d 1024, 1029 (1st Dist. 1990). "Ratification must be of the same nature as which would be required for conferring authority in

the first place," and "the document . . . must show that the principal fully understood that ratification included the contract at issue." *Id.* Here, the resolution specifically mentions the lease at 1550, and it expressly authorizes and ratifies Clair's actions. The consent resolution also expressly states that "the Union" ratifies and authorizes his actions. The Local's bylaws do require authorization from the union membership for new leases, but the membership was on notice as there were several membership meetings held in the new hall, with nearly uniform satisfaction with the property. That Local 726 intended to ratify Clair's action is only further supported by the fact that Local 726 moved into the property and began paying rent.

Effect of the Executive Board Resolution

Finally, Local 700 argues that obtaining a valid consent resolution was a necessary "condition" of the lease, and that the consent resolution, provided in violation of Local 726's bylaws, made the lease invalid. However, the lease provision calling for the resolution is a warranty, not a necessary condition of the lease. The provision states specifically that "Tenant warrants that the execution hereof has been authorized . . . and evidence of same shall be provided upon the execution hereof." This warranty provision, created for the benefit of Plaintiff, could be waived by Plaintiff. *See Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶20 ("Parties to a contract can waive provisions placed in the contract for their benefit . . ."). As such, the validity of the consent resolution under Local 726's bylaws has no effect on the validity of the lease.

Because the lease was valid and enforceable against Local 726, Local 726 breached the lease when it failed to make the August 2009 rent payment and is liable to Plaintiff for that breach.

B. Successor Liability for Local 726's Breach

For Local 700 to be liable for Local 726's breach, successor liability must exist between the organizations. Illinois courts have not directly addressed whether a labor union can be liable as the successor of another labor union. However, in other jurisdictions, courts have imposed liability on successor labor organizations by applying successor liability in the context of collective bargaining agreements, discriminatory acts, and unfair labor practices. *Local Union Number 5741 v. National Labor Relations Board*, 856 F. 2d 733, 736 (6th Cir. 1989); *Parker v. Metropolitan Transportation Authority*, 97 F. Supp. 2d 437, 451 (S.D.N.Y. 2000); *Local 1, Broadcast Employees v. International Brotherhood of Teamsters*, 461 F. Supp. 961, 983 (E.D. Pa. 1978).

The general rule is that an entity that purchases the assets of another entity is not liable. *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App

(1st) 111410, ¶86. Successor nonliability developed as a means of protecting bona fide purchasers from unassumed liability. *Vernon v. Schuster*, 179 Ill. 2d 338, 345 (1997). Yet, the courts have created exceptions to the general rule, imposing liability

> (1) where there is an express or implied agreement of assumption of liability; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations.

Workforce Solutions, 2012 IL App (1st) 111410, ¶86. These exceptions are guided by the equitable principal of protecting creditors from the potentially harsh impact of the dissolution of a debtor entity. *Vernon,* 179 Ill. 2d at 345 (citing *Tucker v. Paxson Machine Co.*, 645 F. 2d 620, 623 (8th Cir. 1981)). Three of the exceptions are applicable here.

Local 700 was unquestionably the result of a consolidation or merger of Local 714 and Local 726. IBT created Local 700 by combining Local 714 and Local 726 without significantly changing either union. The former General Secretary Treasurer of IBT described Local 700 as a "consolidation of the former Local Union No. 714 and Local Union No. 726" in a 2009 letter. Additionally, Local 726 and Local 700's respective tax forms and financial documents use the terms "merger" and label Local 700 the "successor" to Local 726.

Local 700 also qualifies as a continuation of Local 726. The purpose of the continuation exception is to prevent an entity from avoiding liability through "a mere change in form without a significant change in substance." *Vernon*, 179 Ill. 2d at 345-46 (quoting *Baltimore Luggage Co. v. Holtzman*, 80 Md. App. 282, 296 (Md. Ct. Spec. App. 1989)). Illinois courts determine whether a successor entity constitutes a continuation by analyzing similarity in ownership of the two entities. *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052, 1062 (1st Dist. 2009). But, this type of analysis is not aptly transferable to a labor union because it does not have "owners" in the same way as a corporation or other business entity. When addressing the continuation exception, other jurisdictions apply a more general test, which focuses on (1) whether there has been "substantial continuity" between the entities and (2) whether the successor had notice of the liability in question. *Equal Employment Opportunity Commission v. Local 638*, 700 F. Supp. 739, 743 (S.D.N.Y. 1988). Here, there were no significant substantive changes made when Local 700 was formed. The same IBT constitution and officials governed both unions. Nearly every Local 726 member joined Local 700, which not only accepted Local 726's collective bargaining agreements and liabilities (with the exception of the lease), but also occupied the 1550 property for several months and paid rent. Finally, IBT had notice of Local 726's lease through its trustees, John Coli and Becky Strzechowski.

Local 700 exhibited the necessary intent to defraud 1550, and therefore, the fraud exception applies here too. Unlike Illinois' mere continuation exception, successor liability through fraud does not require similar identity of ownership. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 509 (2d Dist. 2010). The fraud exception analysis focuses on whether the entities acted with intent to defraud or avoid an obligation. *Id.* Strzechowski's comments about the lease's "crushing liability" and the unions' actions, namely transferring assets without receiving reasonably equivalent value and engaging in lease modification negotiations after IBT decided to dissolve Local 726, show intent to avoid Local 726's obligations under the lease. Additional evidence of intent to escape liability and support for the fraud exception is discussed below in the context of Plaintiff's fraudulent transfer claims.

C. Transfer of Local 726's Assets to Local 700

As Local 726's successor, Local 700 is liable for any damages that flow from Local 726's breach of the lease. But, Plaintiff also alleged that Local 726 violated the Uniform Fraudulent Transfer Act as a means of recovering damages directly from Local 700. At trial, Plaintiff introduced evidence that Local 726 fraudulently transferred its assets, including its collective bargaining agreements, to Local 700 for no value.

Under Section 5(a) of the Uniform Fraudulent Transfer Act, a transfer is fraudulent if the debtor makes the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor." 740 ILCS 160/5(a). Under Section 6(a), a transfer is fraudulent if the debtor makes the transfer "without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . " 740 ILCS 160/6(a). If a transfer is in fact voidable, the debtor's creditor is entitled to recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claims, whichever is less, and judgment may be entered against the transferee or the person for whose benefit the transfer was made. 740 ILCS 160/9(b)(1).

Here, Local 726's assets were intentionally transferred to Local 700 to avoid Local 726's obligations under the lease. Testimony at trial established that Local 726 had been considering renegotiation, litigation, or bankruptcy to avoid the lease debt for some time. Coli later recommended the dissolution of Local 726 and the creation of Local 700. Strzechowski, with full knowledge of the Local's pending dissolution, continued to negotiate with Plaintiff for lease end dates well past when Local 726 was to be dissolved. When Coli assumed trusteeship over the new Local 700 in December, he transferred all of Local 726's assets, including cash, furniture, and collective bargaining agreements, to Local 700, while deliberately rejecting the lease agreement. All talk of bankruptcy or negotiation of the lease abruptly ceased

just days after a proposed agreement between Local 726 and Plaintiff failed. Local 726 was left with no assets, received no equivalent value in exchange, and was dissolved.

Local 700 argues that it could not receive "a reasonably equivalent value" when the collective bargaining agreements were transferred to Local 700 because they have no value. The value of the collective bargaining agreements, however, is found in the "mandatory" union dues which the Local receives. Much like accounts receivable, union dues are convertible to cash at future dates and are assets with significant value that can be transferred. The in-house counsel for Local 700 testified that even before they were the authorized bargaining agent under the collective bargaining agreements, Local 700 saw the value in the agreements and was actively trying to maintain Local 726's collective bargaining agreements.

Local 700 further asserts that Local 726's collective bargaining agreements, along with its tangible property and cash, cannot be "transferred" within the meaning of the Act because Local 726's rights in the agreements and other assets were "extinguished." Yet, these assets were clearly transferred. A vast majority of members consented to the transfer of their collective bargaining agreements to Local 700, with only a few members rejecting it. Documents admitted at trial further demonstrate that Local 700 received substantial assets in the form of cash, investments, and tangible property from Local 726. To say that Plaintiff cannot recover these assets from Local 700 because they must be administered "only in the interests of the employees," would permit unions to avoid liability on any agreement they no longer view as favorable to them. Locals enter into contracts, like leases, and perform those contracts by making payments with Local assets, including union dues. It follows that Plaintiff can recover damages for Local 726's failure to perform such a contract from those same assets.

As a result, the transfer of Local 726's assets, including the collective bargaining agreements, to Local 700 was fraudulent under the Act and provides Plaintiff with an alternate basis of recovery. Local 726 transferred assets in excess of the amount owed to Plaintiff; consequently, Plaintiff is entitled to recover its damages, as the lesser of the two values, from Local 700.

D. Liability for Intentional Interference with the Lease

To recover against the IBT Defendants for intentional interference with contractual relations, Plaintiff must prove (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contractual relationship; (3) the defendant's intentional and unjustified inducement of breach of the contract; (4) a subsequent breach by the other caused by the defendant's wrongful conduct; and (5) damages. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1st Dist. 1998).

Here, Plaintiff established that the lease was valid and enforceable. It is also clear that the IBT Defendants acted intentionally when IBT induced Local 726's breach. IBT chose to dissolve Local 726 and thereby interfere with Local 726's ability to perform under the lease. And evidence presented at trial shows that the IBT Defendants had both actual and constructive knowledge of the lease when IBT dissolved Local 726. General President Hoffa had at least constructive knowledge through his agent Strzechowski as trustee. Coli clearly had actual knowledge, but most other General Executive Board members had no knowledge of the lease.

Thus, the issue is whether the IBT Defendants' decision to dissolve Local 726 falls within a "privilege." Acts of interference are considered privileged where a defendant acts to protect an interest of equal or greater value than the plaintiff's contractual rights. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 157 (1989). Here, IBT is bound by a fiduciary duty to act in the best interest of its members under the IBT constitution, a valid contract between IBT and its Locals. *See United Association of Journeymen & Apprentices v. Local 334*, 452 U.S. 615, 620-23 (1983). Weighing the Plaintiff's contractual rights under the lease against IBT's fiduciary duty to act in the best interest of its locals, it is clear that the IBT Defendants' actions fall within a privilege. *HPI Health,* 131 Ill. 2d at 157 (citing *Swager v. Couri*, 77 Ill. 3d 173, 191 (1979)).

According to the Illinois Supreme Court, however, that is not the end of the analysis, because the Plaintiff may still recover for an intentional interference with contract if the decision to dissolve Local 726 was unjustified or malicious. *Id.* at 158.[1] Unjustified actions include unlawful conduct or acts unrelated to the privileged party's protected interest. *Id.* In analyzing whether acts of interference are justified, courts in Illinois and elsewhere have considered a number of factors, including the following:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties[.]

[1] This is the analytic framework established by our Supreme Court in *HPI Health.* Although a bit redundant, the framework captures the essential elements of the tort, but seems to confuse the competing burdens of proof relative to the elements versus the affirmative defense of privilege and justification. *See Roy v. Coyne*, 259 Ill. App. 3d 269, 277 (1st Dist. 1994); *see also* Polelle & Ottley, *Illinois Tort Law* § 11.01 at 11-3, 11-4. The evidence against Coli, however, is so overwhelming that the Court need not resolve the issue because regardless of which party bears the burden, Coli's actions were demonstrated to be unjustified.

Restatement (Second) of Torts § 767 (cited approvingly by *Roy v. Coyne*, 259 Ill. App. 3d 269, 277 (1st Dist. 1994)). In weighing these factors in light of the evidence at trial, it is clear that the IBT Defendants acted in connection with a protected privilege and can have no liability because, among other reasons, they had limited knowledge of the lease and only a modest level of involvement. This is true for each IBT Defendant, except Coli.

Coli stands apart. Coli's actions are unjustified and not protected by privilege precisely because he orchestrated an unlawful act: a scheme to defraud a creditor. Testimony and evidence illustrate that Coli played an integral role in all stages of Local 726's dissolution and the subsequent fraudulent transfer of its assets. Coli did this with actual knowledge of the lease and an expressed desire to avoid the financial obligation. Conversely, the other IBT Defendants were only remotely involved, if at all. Coli made the presentation to the General Executive Board and urged that they vote to dissolve Local 726. As trustee of the newly created Local 700, Coli unilaterally chose to accept all of the assets of Local 726 while repudiating its most significant liability, the 1550 lease. Even more telling, Coli alone decided to the abandon the 1550 property and to move Local 700 into a nearby office owned by Teamsters Local 727, another union local controlled by Coli and his son. By that action, Coli exposed the members of Local 700 to the continuing obligation under the lease at issue here while incurring a new additional obligation at the Local 727 office space. That action was plainly against the interest of the members of Local 700 and is wholly unjustified.

E. Damages

The final matter to be resolved is the appropriate amount of damages. Plaintiff's damages are dependent on several provisions in the lease and whether Plaintiff was obligated to mitigate its damages.

Enforceability of the Double-Rent Provision

The first issue with respect to damages pertains to Section 9 of the lease, which provides that Local 726 must pay double the base rent for the remaining ten years of the lease if it fails to purchase the property on the last day of the lease's fifth year. The parties dispute whether this "double-rent provision" is an unenforceable liquidated damages provision. In order to constitute a valid and enforceable liquidated damages provision, the double-rent provision must be: (1) agreed upon by both parties with the intention of settling damage arising from a breach, (2) for an amount bearing a reasonable relationship to damages that may be sustained, and (3) concerning a breach that actual damages would be difficult to prove. *GK Development, Inc. v. Iowa Malls Financing Corp.*, 2013 IL App (1st) 112802, ¶49 (citing *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (1st

Dist. 2004)). Here, the enforceability of the double-rent provision hinges on whether the total rent due thereunder bears a reasonable relationship to the Plaintiff's potential damages in the event Local 726 failed to purchase the property.

The double-rent provision not only requires Local 726 to pay significantly more than the fifth-year purchase price of the property and more than double the Plaintiff's loan amount, but also allows the Plaintiff to retain ownership of the property. This recovery far exceeds any potential actual damages Plaintiff could foreseeably incur, and enforcement of the clause results in an unenforceable windfall for the Plaintiff. *GK Development,* 2013 IL App (1st) 112802, ¶57. Additionally, Friedman himself likened the provision to a holdover penalty and admitted that he intended the damages to secure performance. As a matter of public policy, provisions that are penal in nature or intended to secure performance of an option through a threat are unenforceable. *Jameson Realty Group v. Kostiner,* 351 Ill. App. 3d 416, 423 (1st Dist. 2004). Consequently, the double-rent provision will not be enforced and Plaintiff's damages must be based on the normal rents due under the lease for the period of the lease following the fifth-year obligation to purchase.

Liquidated Damages in the Event of Default

The lease provides for liquidated damages in the event of tenant default. Section 14(B)(i) applies where the lease is terminated by Plaintiff and provides for damages in an amount "equal to the value of the Rent provided to be paid by Tenant for the balance of the Term." The parties agree that Section 14(B)(i) applies here; however, they dispute the meaning of "value" and the appropriate discount rate to be applied. Section 14(B)(i) does not provide a method for calculating value, but Section 14(B)(ii) does. Section 14(B)(ii) applies in the event that Plaintiff terminates Local 726's possession of the leased property and provides for liquidated damages equal to the "present value of the rent." It then specifies that "such present value is to be computed on the basis of a per annum yield on U.S. Treasury obligations maturing closest to the Expiration Date calculated on the date specified" in the termination notice.

Given the proximity of the two liquidated damages provisions in the contract, Plaintiff's expert Michael Goldman applied the Treasury obligation formula from Section 14(B)(ii) to determine the value of the rent under Section 14(B)(i), assuming the double-rent provision was unenforceable. Applying this method, Goldman determined that Plaintiff's liquidated damages, with prejudgment interest through the trial date, amount to $1,945,653. This sum, however, does not include the $51,200 owed to Plaintiff for the four-month period during which Local 700 occupied the property without paying rent before Plaintiff terminated the lease. Plaintiff's total damages are thus $1,996,853.

Local 700 urges a method of calculating value that deducts mortgage payments and other property-related expenses from the monthly rental payments owed and requires an offset for the fair market rental value of the remainder of the lease. But, Local 700's method is flawed in several respects. First, the lease does not indicate in any manner that the amount of rent owed was dependent on Plaintiff's mortgage payments or property-related expenses. Thus, Plaintiff's obligations to others are irrelevant for purposes of calculating the "value" of the rent. Second, the sentence in Section 14(B)(i) that states "[i]f the fair market rental value of the Premises . . . for the balance of the Term exceeds the value of the rent provided to be paid by the Tenant for the balance of the term, Landlord shall have no obligation to pay to Tenant the excess of any part thereof or credit such amount" does not require an offset for the fair market value. It merely provides that in the event the fair market value for the remainder of the lease exceeds the value of the rent Local 726 agreed to pay for that period, Local 726 was not entitled to apply that excess value towards the amount owed by Local 726 to Plaintiff.

In the alternative, Local 700 challenges the validity of Section 14(B)(i), asserting that it is an unenforceable liquidated damages provision that exceeds Plaintiff's actual damages. Local 700 has the burden of proving that the provision is a penalty where, as here, there is nothing on the face of the contract that suggests the provision is a penalty. *Paramount Pictures Distributing Corp. v. Gehring*, 283 Ill. App. 581, 596 (1936). The liquidated damages sought under Section 14(B)(i) meet each of the three requirements for liquidated damages set forth above.

First, Plaintiff included the provision in the lease to allow it to recoup the expenses it initially incurred in purchasing and building out the property (solely for Local 726's use); to account for uncertainty in the real estate market; and to account for its inability to calculate the potential cost of refinancing the mortgage. That neither party could specifically recall discussing the provision does not prove lack of intent to settle on a sum of damages. Moreover, 14(B)(i) does not permit Plaintiff to seek either liquidated or actual damages, as Local 700 contends. Instead, it permits Plaintiff to recover the value of the rent for the remainder of the term following default and any other amounts for which Local 726 is liable to Plaintiff.

Second, the amount sought is reasonable and bears a relation to the actual damages that Plaintiff sustained. Section 14(B)(i) does not set a fixed dollar amount irrespective of when default occurs during the course of the lease. *GK Development*, 2013 IL App (1st) 112802, ¶ 73 ("The element common to most liquidated damages clauses that get struck down as penalty clauses is that they specify the same damages regardless of the severity of the breach.") (citations omitted). Instead, it incorporates a calculation method which requires Local 726 to pay damages in an amount commensurate to the value of the rent due for the remainder of the lease. Local 700 contends that Plaintiff's actual damages are approximately $1 million less than the liquidated damages provision provides for,

but does not take into consideration Plaintiff's loss of the property itself as a result of Local 726's default.

Lastly, Section 14(B)(i) fixes damages that would otherwise be uncertain and difficult to prove. At the time of contracting, Plaintiff had incurred substantial up-front costs in obtaining property specifically for Local 726 without knowing what the value of that property may be at any point in the future and could not predict the potential cost of refinancing his mortgage if Local 726 defaulted under the lease.

Plaintiff's Duty to Mitigate Damages

The final issue with respect to damages is whether Plaintiff had a duty to mitigate its damages in light of the liquidated damages provision in the lease. Although addressed by other states, Illinois courts have yet to decide whether a non-breaching party has a duty to mitigate damages when the parties have agreed to liquidated damages in a commercial lease. Under Section 5/9-213.1, a landlord must take "reasonable measures to mitigate the damages recoverable against a defaulting lessee." 735 ILCS 5/9-213.1.

Here, the Plaintiff clearly made reasonable efforts to mitigate his damages; therefore, it is unnecessary to resolve the issue of whether Section 5/9-213.1 applies to commercial leases with a liquidated damages provision. *MXL Industries, Inc. v. Mulder*, 252 Ill. App. 3d 18, 31 (2d Dist. 1993) (holding that determination of whether or not a landlord's attempt to mitigate are reasonable is a question of fact). Plaintiff not only attempted to renegotiate the original lease terms with Local 700, but also hired a brokerage firm to help lease or sell the property at a reduced price before Local 700 vacated. These actions certainly constitute the necessary reasonable effort mandated by Section 5/9-213.1. *See Danada Square LLC v. National Management Co.*, 392 Ill. App. 3d 598, 609 (2d Dist. 2009) (finding a landlord's unwillingness to negotiate with a suitable, potential tenant unreasonable mitigation efforts); *Kallman v. Radioshack Corp.*, 315 F.3d 731, 740 (7th Cir. 2002) (finding a landlord's efforts were not reasonable because she failed to hire a real estate broker in a timely manner and bargained for higher rental rates with prospective tenants).

F. Attorney Fees & Costs

Plaintiff seeks $291,473.82 in attorney fees and $30,293.85 in costs pursuant to the lease, which provides that "Tenant shall pay all attorneys fees and costs incurred by Landlord in enforcing the terms and provisions of this Lease." Plaintiff's petition is supported by an affidavit from its principal attorney, along with comprehensive time records and billing summaries from each of the three firms with which counsel was associated during the course of the litigation.

Plaintiff's petition and supporting documentation are sufficient to demonstrate that the attorney fees and costs Plaintiff seeks are reasonable.

Defendants object to the petition on several grounds. Defendants first assert that Plaintiff should not be entitled to recover the fees and costs Plaintiff incurred with respect to the tort claims against Local 700 and the other Defendants on the basis that those fees and costs were not incurred "in enforcing the terms and provisions" of the lease. These fees and costs, however, are sufficiently related to Local 726's default under the lease and Plaintiff's efforts to recover damages pursuant to the lease.

Defendants further assert that Plaintiff is not entitled to recover $11,900 in expert witness fees. While statutes permitting a prevailing party to recover "costs" of litigation have been interpreted to exclude expert witness fees, the language of the lease governs here. That language permits recovery of all costs incurred in enforcing the terms and provision of the agreement and thus has a broader meaning. To successfully enforce the lease through litigation, Plaintiff had to obtain an expert witness on damages. That expert's testimony was instrumental in Plaintiff's ability to secure judgment and recover under the lease. As a result, Plaintiff is entitled to recover its expert witness fees as a cost of enforcement.

Judgment

The Court is mindful that its decision here imposes a financial burden that may ultimately be borne by the hardworking men and women of Teamsters Local 700. But to sanction a contrary result would be a death knell for contract rights—a far worse result for working men and women. If today the law allowed a labor leader to unilaterally repudiate a contractual obligation under a lease, what would keep an employer from doing the same tomorrow under a labor contract? In its most basic sense, every contract is a promise or set of promises that the law will enforce irrespective of whim or conflicting human desire.

For all these reasons, it is therefore ORDERED:

(1) A judgment is entered on Counts I, II, and III in favor of Plaintiff 1550 MP Road, LLC, and against Defendant Teamsters Local Union No. 700, in the amount of $1,996,853 in damages (including prejudgment interest) and attorney fees and costs of $321,767.67 totaling $2,318,620.67, plus post-judgment interest.

(2) A judgment is entered on Count VIII in favor of Plaintiff 1550 MP Road, LLC, and against Defendant John Coli, in the amount of $1,996,853 in damages (including prejudgment interest), plus post-judgment interest and costs.

(3) A judgment of no liability is entered on the remaining counts against the remaining defendants.

(4) This is a final order that disposes of the case in its entirety.

Judge Raymond W. Mitchell

ENTERED,

JUL 14 2015

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992