Docket: **2084CV00259-BLS2**
Date: **June 1, 2020**
Parties: **CWB RETAIL LIMITED PARTNERSHIP v. LULULEMON USA, INC.[1]**
Judge: **/s/Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER DENYING MOTION TO DISMISS

This is a summary process action. CWB Retail Limited Partnership seeks to evict lululemon USA, Inc., from commercial retail space it rents on Boylston Street in Boston. CWB contends that it provided three notices of default may evict lululemon for repeatedly storing goods in a manner that constricted access to an emergency exit.

Lululemon has moved to dismiss this action. It argues that: (1) CWB's notices of default were not effective because they were sent to the wrong place; (2) the notices were not adequate because they did not specify what code provision lululemon violated; and (3) the claimed defaults were not serious enough to warrant forfeiture of the lease.

These arguments are unavailing. First, a default notice that was sent to the wrong address but forwarded to the right person or place would be effective. Second, the lease does not require every default notice based on a violation of law to specify the legal provision at issue; such a notice would still be adequate if it informed lululemon what needed to be cured. Third, whether the claimed defaults in this case are serious enough to warrant forfeiture, as provided in the lease, involves questions of fact that cannot be resolved at this stage of the case. The Court will therefore deny the motion to dismiss.[2]

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[1] The defendant does not capitalize its name.

[2] As requested by lululemon, the Court has considered the parties' lease and the three notices of default in deciding the motion to dismiss. It may do so because CWB relied upon these documents in framing the complaint, refers to the lease and third notice in the complaint, and does not dispute the authenticity of the first two notices. See Maram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004) (document relied upon in framing complaint); Berkowitz v. President & Fellows of Harvard College, 58 Mass. App. Ct. 262, 270 n.7 (2003) (document referenced in complaint); Town of Barnstable v. O'Connor, 786 F.3d 130, 141 n.12 (1st Cir. 2015) (document whose authenticity is not disputed).

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1. Factual Background. CWB and lululemon entered into their lease in 2007. The lease provides that it is governed by Massachusetts law. Lululemon's obligations under the lease include that it must comply with all federal, Massachusetts, and Boston laws.

CWB has the contractual right to terminate the lease and evict lululemon upon any "Event of Default." The lease provides that lululemon is in default if it fails to cure a non-monetary breach within a reasonable time after CWB has sent a notice of default. And it provides that if in any calendar year CWB has already sent lululemon two notices of non-monetary breach, and lululemon then commits a "substantially similar" breach in that same year, lululemon shall be in default with no opportunity to cure upon CWB giving written notice of the third breach.

Any notice permitted or required by the lease "shall be in writing and shall be sent by registered or certified mail, postage prepaid, or shall be delivered by express carrier." The lease provides that any notices intended

for lululemon must be sent to the attention of lululemon's director of store development at a specified corporate address and to a named outside counsel at a different specified address. In 2015 the parties executed a lease amendment that changed these addresses, and designated a new outside counsel who was to receive any notice, but did not otherwise modify the notice provision.

The notice provision goes on to state that 141 such notices shall be effective when received or receipt is refused at the address to which the same were sent."

CWB sent three written notices of default to lululemon on October 23, December 23, and December 27, 2019. All three notices asserted that lululemon had breached its obligations to comply with all applicable laws by storing goods in corridors or passageways that constitute emergency egress. CWB enclosed photographs with the second and third notices to show the conditions that it contended constituted breaches of the lease.

CWB sent all three notices of default to lululemon's old address "via overnight delivery," but failed to send the notices to the new address specified in the lease amendment. It sent a copy of the first notice to the outside counsel listed in the original lease, but not to the new outside counsel listed in the amendment. CWB did not send the second or third notices to any outside counsel.

The notice letters indicate that copies of all three notices were sent by email to Angela Bertolino at lululemon and delivered in-hand to the store manager at lululemon's Boylston Street facility.

The first two notices asserted that lululemon's storage of goods in the corridor leading to an emergency exit was unlawful, without mentioning what law this violated. The third notice asserted that the Boston Fire Department had determined that lululemon was violating the Boston fire code, but did not cite any particular provision. CWB enclosed photographs with the second and third notices, but not the first one, documenting the alleged improper storage of goods.

2. Notices Sent to Wrong Addresses. Lululemon contends that the notices of default are ineffective as a matter of law because they were not sent to the correct addresses. The Court disagrees.

Though CWB was required to send written notices of default and give lululemon a reasonable opportunity to cure its first two alleged non-monetary breaches, sending the notices to the particular addresses specified in the lease was not a condition precedent to termination. Actual notice would suffice even if the notice was sent to the wrong place.

The parties to a contract are free to agree that a certain condition must be met before a party can exercise a particular right under the contract; such agreed-upon conditions are known in the law as "conditions precedent." See generally City of Haverhill v. George Brox, Inc., 47 Mass. App. Ct. 717, 719 (1999).

If contracting parties want to create a condition precedent, they can do so by saying that a right may later be exercised "on the condition that," "provided that, or "if," some condition is satisfied, or by using similarly explicit language. Massachusetts Port Auth. v. Johnson Controls, Inc., 54 Mass. App. Ct. 541, 544 (2002). " 'Emphatic words' are generally considered necessary to create a condition precedent that will limit or forfeit rights under an agreement." Massachusetts Mun. Wholesale Elec. Co. v. Town of Danvers, 411 Mass. 39, 46 (1991). Nonetheless, "emphatic or precise words are not absolutely necessary to create a condition. ... In the absence of the usual words, a condition precedent may nonetheless be found to exist if the intent of the parties to create one is clearly manifested in the contract as a whole." Id.

Without a clear indication of such an intent, however, a contract does not create a condition precedent to the exercise of a right or performance

of an obligation.

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MassPort v. Johnson Controls, supra; accord Halstrom v. Dube, 481 Mass. 480, 483 n.8 (2019).

The lease requirement that any notice of non-monetary breach be delivered in writing was a condition precedent, because the lease gives lululemon a reasonably period of time after the sending of a first or second such written notice in one year to cure the alleged breach. See Milona Corp. v. Piece O'Pizza of America Corp., 1 Mass. App. 839, 840 (1973); accord Priestley v. Shares, Inc., 4 Mass. App. Ct. 218, 222 (1976).

But the parties did not make the sending of the notices to the specified addresses a condition precedent to lease termination. To the contrary, the lease provides that written notices to either party "shall be effective when received or receipt is refused at the address to which the same were sent." In other words, the parties agreed that written notice would be effective either if it is in fact received or if it is sent to the correct address but the notice is refused.[3]

Thus, the plain language of the lease makes clear that a notice to lululemon is effective if it is actually received by the company's director of store development, its designated outside counsel, or both of them. Sending a notice to the wrong address would be of no import if the notice or a copy was forwarded to the right person or place.

This interpretation of the contract is consistent with the parties' apparent business purpose, which was to ensure that lululemon would have the opportunity to cure non-monetary breaches so long as only one or two such events happened in any calendar year.

As with any contract concerning a business venture, the Court must construe the lease in a manner that will give it "effect as ... rational business instrument[s] and in a manner which will carry out the intent of the parties."

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[3] The clause at the end of this sentence in the lease is best understood as modifying only the last verb, "refused," and not also modifying "received." When reading a statute or other legal document, a modifying clause should generally be read "to modify only that which immediately precedes it." See Commonwealth v. Wright, 88 Mass. App. Ct. 82, 87 (2015). Appellate courts refer to this principle as the "last antecedent rule" and consider it to be a "rule of statutory as well as grammatical construction." Id., quoting Hopkins v. Hopkins, 287 Mass. 542, 547 (1934). This principle applies to the interpretation of a written contract. See Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 123 (1986).

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Robert and Ardis James Foundation v. Meyers, 474 Mass. 181, 188 (2016), quoting Starr v. Fordham, 420 Mass. 178, 192 (1995). "[T]he parties' intent 'must be gathered from a fair construction of the contract as a whole and not by special emphasis upon any one part.' " Kingstown Corp. v. Black Cat Cranberry Corp., 65 Mass. App. Ct. 154, 158 (2005), quoting Ucello v. Cosentino, 354 Mass. 48, 51 (1968), and Crimmins & Peirce Co. v. Kidder Peabody Acceptance Corp., 282 Mass. 367, 375 (1933).

If a contract specifies that notice must be provided by registered or certified mail, any notice that is actually received will be effective even if it was instead sent or delivered in some other way. See Computune, Inc. v. Tocio, 44 Mass. App. Ct. 489 (1998); Gerson Realty Inc. v. Casaly, 2 Mass. App. Ct. 875, 875 (1974). "The function of a requirement that notice

be transmitted by registered mail is to provide a means of resolving disputes as to the fact of delivery of the notice." Computune, supra, quoting Gerson Realty, supra.

Much the same is true here. The point of requiring that notice by sent in writing to two specified addresses is to avoid disputes as to whether lululemon received actual notice. But if the proper agents of lululemon did in fact receive a written notice (or copy of a written notice) from CWB, then the fact that the notice was sent to the wrong address is of no moment.

3. Notices Did Not Cite Specific Law. CWB next argues that the notices of default were inadequate because none of them explicitly identified what law or ordinance was violated by storing goods in a space leading to an emergency exit. This argument is also without merit.

So long as a written notice adequately informs lululemon of the nature of the alleged breach, so that it has the information it needs to cure the problem, the notice is sufficient.

The lease does not require that a notice of non-monetary breach that alleges lululemon has violated some law must provide a specific legal citation. The Court may not read into the contract a provision that was not adopted by the parties. "[W]here sophisticated parties choose to embody their agreement in a carefully crafted document, they are entitled to and should be held to the language they chose." Fronk v. Fowler, 71 Mass. App. Ct. 502, 508 (2008), quoting Anderson St. Assocs. v. Boston, 442 Mass. 812, 819 (2004).

In making this argument, CWB relies on two trial court decisions from New York that apparently were applying New York law. That authority is not

relevant here, because the parties agreed that their lease is governed by Massachusetts law. And CWB has not identified any Massachusetts case law reading such a requirement into a commercial contract.

4. Gravity of the Default. Finally, lululemon argues that its alleged breaches of the lease were not serious enough to justify forfeiture of its remaining tenancy. This is not an issue that can be resolved on the pleadings and thus not a basis for dismissing CWB's summary process complaint.

As Lululemon correctly notes, a tenant may seek equitable relief against forfeiture of a lease—and thus against eviction in a summary process proceeding—even if the tenant is in breach and the lease by its terms allows the landlord to terminate the tenancy. See generally Howard D. Johnson Co. v. Madigan, 361 Mass. 454,456459 (1972); DiBella v. Fiumara, 63 Mass. App. Ct. 640, 648-649 (2005).

Such relief against forfeiture under a default clause is generally appropriate only where the tenant's breach was "insignificant or accidental." DiBella, supra, at 644; see also id. at 658-649.

The Court cannot determine on the face of the complaint and the default notices submitted by lululemon whether lululemon's alleged violations of law were insignificant or accidental. As a result, this is not a ground for dismissal.

Lululemon's assertion that its alleged breaches must be insignificant because the written notices of default do not establish they are significant is without merit. The lease did not require CWB to establish the significance of an alleged breach in a notice of default.

ORDER
Defendant's motion to dismiss is DENIED.

/s/Kenneth W. Salinger Justice of the Superior Court