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Docket: SUCV2019-02430BLS1

Date: March 5, 2020

Parties: MAYNARD INDUSTRIAL PROPERTIES ASSOCIATES TRUST vs. COMCAST OF MASSACHUSETTS III, INC.

Judge: /s/Karen F. Green Karen F. Green Justice of the Superior Court

DECISION AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Maynard Industrial Properties Associates Trust ("MIPA"), seeks a declaratory judgment specifying the rent payable under a lease agreement with the defendant, Comcast of Massachusetts III, Inc. ("Comcast"), for commercial premises located at 124 Acton St., Maynard, MA ("Property"). The matter is now before me on Comcast's motion for judgment on the pleadings. After hearing, Comcast's motion is allowed.

Facts

On or about June 1, 1999, MIPA, as landlord, entered into a written lease agreement (the "Lease") with A-R Cable Investments, Inc. ("A-R Cable"), Comcast's predecessor-in-interest, as tenant, of the 21,189 square foot Building No. 1 at the Property ("Demised Premises").[1]

Pursuant to Article 3(1) of the Lease, the Primary Term of the Lease was fifteen years, or through May 31, 2014. As set forth in Article 4(1) of the Lease, the Annual Base Rent during that Primary Term was \$148,323.00, or \$7 per square foot.

Article 3(2) of the Lease granted the tenant two options to extend the term of the Lease for an additional five years each. Article 4(2)(a) provided that the Annual Base Rent during the First Extended Option, which was to run five years from the Expiration Date of May 31, 2014, would be \$211,890.00, or \$10 per square foot. Article 4(2)(b) provided that the Annual Base Rent during the Second Extension Option, which was to run five years thereafter, would be \$317,835.00, which represents \$15 per square foot.

In or about September of 2002, MIPA entered into a First Amendment to Lease that is not relevant to the issue in this litigation. By a Second Amendment to Lease, dated November 1, 2013 ("Second Amendment"), MIPA and Comcast further amended the Lease. Among other things, the Second Amendment: (1) extended the Demised Premises Term of the Lease by five years, from

[1]MIPA owns the Property.

-1-

June 1, 2014 through May 31, 2019; (2) reduced the Annual Base Rent for that period to \$185,403.75, or \$8.75 per square foot; (3) amended Article 3(2) of the Lease to provide "that the First Extension Option shall commence on June 1, 2019, and that the Second Extension Option shall commence on June 1, 2024;" and (4) provided for certain improvements to the Demised Premises at MIPA's cost.

Section 5 of the Second Amendment deleted Article 4, Section 2 of the Lease, entitled "Base Rent," and replaced it, in pertinent part, with the following:

During the First Extension Option term and Second Extension Option term (if any), all the terms, conditions, covenants and agreements set forth in the Lease shall continue to apply and be binding upon Landlord and Tenant, except that the rent payable during the applicable extension term shall be 100% of the then-prevailing market rent rate for similar quality buildings in the Maynard, Massachusetts market (the "Market Area") taking into account typical market concessions and allowances,

the size of the space, the quality of the tenant and the presence or absence of costs such as commissions, retrofit allowance, vacancy periods, etc. (the "Market Rental Rate"); provided, however, that the Market Rental Rate shall be not less than the current rent of \$8.75 per square foot and not more than 110% of the rent for the preceding lease year.

(emphasis added).

By letter dated August 23, 2018, Comcast exercised its First Extension Option to extend the Lease for five years commencing on June 1, 2019, and notified MIPA that rent during that extension was to be determined in accordance with Section 5 of the Second Amendment. Comcast later notified MIPA that the Annual Base Rent for the First Extension Option would be \$9.63 per square foot.

On April 1, 2019, MIPA filed this action seeking a declaration that the Annual Base Rent during the First Extension Option is \$18.10, or some amount more than \$9.63, per square foot. The parties agreed that Comcast would continue to lease the premises during the pendency of this action and that they would comply with whatever judgment is entered.

Discussion

In considering Comcast's Rule 12(c) motion, I accept, as I must, all well-pleaded factual allegations in the Complaint as true and draw all reasonable inferences in MIPA's favor. *Boston Water & Sewer Comm 'n v. Comm.*, [64 Mass. App. Ct. 611](#), 614 (2005); *Jarosz v. Palmer*, [436 Mass. 526](#), 529-30 (2002). I also take into account the exhibits attached to and referenced in the Complaint.

At issue is the Annual Base Rent for the Demised Premises during the First Extension Option under the Lease. "The interpretation of the terms of an unambiguous written lease is a matter of law for the court..." *Bright Horizons Children's Centers, Inc. v. Sturtevant, Inc.*, [82 Mass. App. Ct. 482](#), 585 (2012), quoting *Great Atl. & Pac. Tea Co. v. Yanofsky*, [380 Mass. 326](#),

-2-

334 (1980). Thus, I first must examine the language of the Lease, particularly that of the Second Amendment, "independent of extrinsic evidence concerning the drafting history or the intention of the parties," to determine whether it is ambiguous. *Ferri v. Powell-Ferri*, [476 Mass. 651](#), 654 (2017), quoting *Bank v. Thermo Elemental Inc.*, [451 Mass. 638](#), 648 (2008). "Contract language is ambiguous 'where the phraseology can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken.'" *President & Fellows of Harvard College v. PECO Energy Co.*, [57 Mass. App. Ct. 888](#), 896 (2003), quoting *Suffolk Constr. Co. v. Lanco Scaffolding Co.*, [47 Mass. App. Ct. 726](#), 729 (1999). Where the words of a contract are ambiguous, other contract provisions and, where available, extrinsic evidence may be examined to determine the parties' intent and construe the ambiguous language in accordance with that intent. See *Robert Industries, Inc. v. Spence*, [362 Mass. 751](#), 753-755 (1973). Whether any ambiguity exists is a question of law for the court. See, e.g. *President & Fellows of Harvard College v. PECO Energy Co.*, [57 Mass. App. Ct. 888](#), 891 (2003).

Here, no ambiguity exists in the language of Section 5 of the Second Amendment.[2] That part of the sentence preceding the semicolon states that, with the exception of rent payable during an extension, "all the terms, conditions, covenants and agreements set forth in the Lease" shall continue to apply,"[3] and then describes the first step by which rent is to be calculated for each extension term.[4] The meaning of the language after the semicolon, "provided, however, that the Market Rental Rate shall be not less than the current rent of \$8.75 per square foot and not more than 110% of the rent for the preceding lease year," is equally clear. It sets both a floor and a ceiling for the rent calculation described before the semicolon. "The

word 'provided' in common speech naturally expresses a qualification, limitation, condition, or an exception respecting the scope and operation of words previously used. In conjunction with the word "however," it is clear that the proviso following the semicolon created an exception to the ...procedure outlined prior to the semicolon." *Bailey v. Astra Tech, Inc.*, [84 Mass. App. Ct. 590](#), 595 (2013), quoting *Sears v. Childs*, [309 Mass. 337](#), 345-346 (1941) (internal quotation marks and citation omitted). Thus, "the Market Rental Rate" calculated under Section 5 "shall be not less than the current rent of \$8.75 per square foot and not more than 110% of the rent for the preceding lease year."

It is undisputed that the rent for the lease year preceding June 1, 2019, was \$8.75 per square foot. Multiplying that rate by 110% results in \$9.625, or rounded, \$9.63, per square foot. Accordingly, I conclude that the rent under the Lease during the five-year extension that commenced on June 1, 2019 is \$9.63 per square foot.

[2] MIPA argued in its opposing memorandum that Section 5's language is "ambiguous and inconsistent" and that the Market Rental Rate under the Lease "is not to exceed \$18.10 per square foot and is not [\$9.63]." When asked for the basis of its argument at the hearing, however, its counsel did not identify any ambiguity in Section 5's language. Nor could he explain how MIPA calculated the \$18.10 rate referenced in its Complaint. He merely stated that MIPA had concluded, based on its own research, that the current market rental value of the Demised Premises is higher than \$9.63, and "no greater than \$18.10," per square foot.

[3] Section 15 of the Second Amendment also provides: "All other terms and conditions of the Lease shall remain in full force and effect." One such term is Article 32(6), which states: "This Lease contains the entire and only agreement between the parties as to the Demised Premises, and no oral statements or representations or prior written matter not contained in this instrument shall have any force or effect. This Lease shall not be modified or cancelled except by a writing signed by Landlord and Tenant."

[4] Both parties agreed at the hearing that whatever the Market Rental Rate calculated in accordance with Section 5, it is to remain the same in each of the five years during the extension term.

-3-

ORDER

Comcast's motion for judgment on the pleadings is allowed. Each party shall bear its own attorney fees and costs. Judgment shall enter declaring that the rent payable during the term of the Lease's First Extension Option, which commenced on June 1, 2019, is \$9.63 per square foot, for a total annual rent of \$204,050.07.

/s/Karen F. Green Karen F. Green Justice of the Superior Court

-4-