

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2320 SUPERIOR, LLC.,)	CASE NO. CV 11 768175
)	
Plaintiff,)	
)	JUDGE BRENDAN J. SHEEHAN
v.)	
)	
DRD, INC., <i>et al.</i> ,)	
)	OPINION AND JUDGMENT
Defendants.)	ENTRY
)	

I. ISSUES PRESENTED.

By entry dated September 26, 2012, the Court determined certain issues between the parties pursuant to Civ.R. 56. The remaining issues in this matter were tried to the Court on the December 11, 2012. Based upon the evidence and arguments presented, the Court finds as follows:

On October 3, 2000, Berkshire Limited Partnership entered into a Lease Agreement with Defendants DRD, Inc. dba Power Direct and Daniel R. Delfino for a portion of the real property located at 2320 Superior Avenue, Cleveland, Ohio, 44114 (hereinafter the "Original Lease"). The term of the Original Lease was from December 1, 2000 to November 30, 2005. After the term of the Original Lease expired, a First Amendment and Lease Extension Agreement (the "Amended Lease") was executed on or about January 25, 2006. The Amended Lease expressly provides that it is made "by and between Berkshire Limited Partnership ("Landlord") and DRD, Inc. dba Power Direct ("Tenant")". The term of the Amended Lease was from January 1, 2006 through December 31, 2006.

On or about May 18, 2007, Berkshire assigned its interest in the Amended Lease to Plaintiff 2320 Superior, LLC. Defendants remained on the premises through December 31, 2008.

Plaintiff brought this action for breach of contract on November 2, 2011 alleging that Defendants DRD, Inc. and Daniel Delfino failed to pay rent and utilities as required under the Amended Lease. The Court previously determined that Daniel Delfino was not a party to the Amended Lease and that the Amended Lease established the agreed upon rental rate for occupancy of the premises after the term of the Amended Lease. The remaining issues concern the parties' obligations for utility charges and Plaintiff's request for attorneys' fees.

II. LAW AND ANALYSIS.

A. Plaintiff's Claim for Utility Charges.

Plaintiff maintains that Defendant is required to pay \$58,669.16 in utility charges that Plaintiff paid during Defendant's tenancy.

With regard to the parties' obligations for utility provision and payment, the Original Lease provided in pertinent:

16. Utilities. Tenant shall pay for the additional rent for the utilities as follows:

(a) Water and Sewer Charges. The Premises shall be furnished with hot and cold water for lavatory and drinking purposes. Tenant shall pay its prorate share (as defined in Section 16) of all water and sewer charges assessed against Landlord with respect to the Building. Tenant's prorate share of water and sewer charges shall be paid on a quarterly basis, within (10) days after the receipt of Tenant of Landlord's invoice specifying Tenant's prorate share of the water and sewer charges for the previous quarter. If such costs are not paid within ten(10) days after the receipt of such invoice, such utility service can be terminated by Landlord. If Tenant uses water for its business purpose, in addition to lavatory and drinking purposes, a submeter must be installed at Tenant's

cost, and the cost of usage of such submeter will be charged to Tenant.

(b) Gas. Landlord shall furnish gas to the Premises and shall use a submeter for the purpose of measuring the amount of gas used in the Premises. Landlord shall read the submeter on a monthly basis and shall provide Tenant with a monthly invoice of gas used. Tenant's monthly invoice for gas shall be based upon the rate charged by the gas utility company to Landlord, plus an administrative charge of seven percent (7%). ...

(c) Electricity. Landlord shall furnish electricity to the Premises and shall use a submeter for the purposes of measuring the amount of electricity used in the Premises. Landlord shall read the submeter on a monthly basis and shall provide Tenant with a monthly invoice of electrical current used. Tenant's monthly invoice for electricity shall be based upon the rate charged by the electric utility company to Landlord, plus an administrative charge of seven percent (7%). ...

* * *

(f) Tenant's Prorate Share. Tenant's prorate share of the utility charges shall be computed by multiplying the amount of such additional charges by a fraction, the numerator of which shall be the square feet of floor space of Tenant's Premises, and the denominator of which shall be the total square feet of leasable floor space contained in the Building.

The Amended Lease provided:

3. All of the terms, conditions, provisions and covenants of the Lease, except as specifically modified or amended herein, shall remain in full force and effect and apply hereto, and Landlord and Tenant agree that the terms of said Lease, as amended herein, shall continue to govern their respective rights and duties.

It is undisputed that neither Plaintiff nor its predecessor in interest ever installed the submeters required by the Original Lease for electrical and gas services. Instead, Tenant was required to pay its pro rata share of the electrical and gas services provided to the Premises, similar to the agreed basis for assessing water and sewer charges.

It was uncontested that Tenant had, throughout the course of the Original Lease and the Amended Lease, paid his pro rata share based upon occupying 13,897 square feet in a building of 82,400 square feet, or 16.87% of the total charges. It is clear from this evidence that the parties to the Original Lease determined that “the total square feet of leasable floor space contained in the Building” for purposes of Section 16(f) of the Original Lease was 82,400.

Landlord asserts that the proper calculation is based upon Tenant’s share of the leased spaced in the Premises, ranging from 13,897 square feet of 18,297 occupied square feet, or 75.95% to Tenant as the only occupant owing 100% of the total utility charges. No evidence was presented to demonstrate any changes to the Premises to justify recategorizing over 60,000 square feet of the Premises as no longer “leasable floor space” under Section 16(f) of the Original Lease. Accordingly, the Court finds that Tenant’s prorated share of the utilities is 16.87% of the charges.

Plaintiff claimed damages of 16,309.54 for water, sewer, electricity and gas charges, including the 7% administrative charge for the time period from May 2007 to October 31, 2007 based upon its calculation of Defendant’s prorated share of 76%. The actual damages due to Plaintiff at the corrected prorated share of 16.87% is \$3,873.71, including the 7% administrative charge. Plaintiff claimed damages of \$42,359.62 for water, sewer, electricity and gas charges, including the 7% administrative charge for the time period from November 1, 2007 to December 31, 2008 based upon its calculation of Defendant’s prorated share of 100%. The actual damages due to Plaintiff at the corrected prorated share of 16.87% is \$7,146.07, including the 7% administrative charge. Therefore, the total damages Plaintiff could be entitled to for utility and administrative charges is \$11,019.78.

However, Defendant submitted evidence that it paid several utility bills directly to the service providers totaling \$11,675.24. Thus, Defendant is entitled to judgment in the amount of its overpayment of utilities in the amount of \$655.46.

B. Plaintiff's Request for Attorney's Fees.

Plaintiff seeks attorney's fees in this action based upon the following provision in the Original Lease:

47. Legal Fees. If on account of any breach by Tenant hereunder, the Landlord employs an attorney or incurs other expense to enforce or defend Landlord's rights hereunder, and Landlord prevails in a final judgment, the Tenant shall pay the landlord all reasonable attorney's fees and other expenses.

The Court finds that this dispute arose in large part from the Landlord's own careless business practices. The Landlord did not regularly apprise the Tenant of charges it believed were due and owing. In fact, the Landlord's express breach of the Lease in failing to install utility submeters directly led to the necessity for a trial in this matter. Accordingly, Plaintiff's request for attorney's fees is denied.

III. CONCLUSION.

Based on the evidence and testimony presented, as to Plaintiff's claim for payment of utility costs, the court finds:

JUDGMENT IN FAVOR OF DEFENDANT IN THE AMOUNT OF \$655.46. EACH PARTY TO BEAR THEIR OWN COSTS.

IT IS SO ORDERED.


JUDGE BRENDAN J. SHEEHAN

Dated: 12/27/12

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 27th day of December, 2012.

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