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CUYAHOGA COUNTY

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SIMBO PROPERTIES, INC.	)	**CASE NO. CV-16-856616**
Plaintiff,	)	**JUDGE PAMELA A. BARKER**
v.	)	**OPINION AND JOURNAL ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT**
M8 REALTY, LLC,	)	
Defendant	)	

On November 9, 2016, Defendant M8 Realty, LLC ("M8") filed a Motion For Partial Summary Judgment ("Defendant's Motion"), seeking summary judgment in its favor and against Plaintiff Simbo Properties, Inc. ("Simbo") on Count I (Breach of Contract) and Count IV (breach of "other pertinent provisions of the lease") of Plaintiff's Complaint. On November 30, 2016, Simbo filed its Brief in Opposition to Defendant's Motion ("Plaintiff's Brief"), on December 12, 2016 M8 filed its Reply in support of Defendant's Motion ("Defendant's Reply"), and on December 16, 2016, Simbo filed its Surreply in opposition to Defendant's Motion ("Plaintiff's Surreply").

On November 30, 2016 Plaintiff filed a Motion For Summary Judgment, seeking summary judgment in its favor and against M8 on Count I (Breach of Contract) and Count III (Property Damage) of its Complaint, and on the construction eviction counterclaim of M8[1] ("Plaintiff's Motion"). On December 27, 2016 M8 filed its Brief in Opposition to Plaintiff's

[1] In its Counterclaim, M8 pled its claim for constructive eviction in the alternative, i.e., if under the terms of the Lease it automatically renewed as Simbo argues, then M8 was constructively evicted from the Lease premises.

("Defendant's Brief"), and on December 29, 2016 Simbo filed its Reply in support of Plaintiff's Motion ("Plaintiff's Reply").

All four counts of Simbo's Complaint[2] and M8's constructive eviction counterclaim are based upon or arise out of a Commercial Lease entered into by and between Simbo as "Landlord" and M8 as "Tenant" as of December 17, 2012 ("the Lease").[3] The "initial Lease term" commenced on December 19, 2012, and ended 18 months thereafter or on June 19, 2014. The Lease contains following provisions relevant to the parties' respective motions:

3. **OPTION TO RENEW.**

> *Tenant may renew* this Lease for up to Two (2) consecutive *renewal* terms, each *renewal* term being for a period of one (6) month *extension* of the term, if Tenant has not committed an uncured Event of Default (as defined in Section 21 of this Lease). Unless Tenant gives Landlord written notice that Tenant does not want to *renew* this Lease at least six (6) months before the commencement of the subsequent *renewal* term.

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33. **NOTICES.**

> (a) All notices and other communications required or permitted hereunder to be given by either party hereto to the other party shall be

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[2] Count II, alleging that real estate taxes are owed by M8 to Simbo under paragraph 5.3 of the Lease, is not the subject of either Defendant's Motion or Plaintiff's Motion. In Simbo's Responses to Requests For Admission Nos. 1 and 2, Simbo admitted that M8 sent it a check in the amount of $8.900.00, and if that check was tendered to pay the real estate taxes, it did not resolve all outstanding issues relative to the Complaint, so the check was never cashed by Simbo. Responses On Behalf Of Simbo Properties, Inc. To Defendant's Discovery Requests, at pages 2 and 3, attached as Exhibit E to Defendant's Motion. In paragraph 5 of the Affidavit of Bernardo Moreno, attached as Exhibit F to Defendant's Motion, M8 averred that It had tendered a check to Simbo for what it believed was its share of the real estate taxes, less M8's security deposit and some other agreed upon adjustments, but Simbo returned the check uncashed.

As relates to this Court's review and reliance upon Simbo's Responses to M8's Requests for Admissions, as part of the evidence submitted and considered by the Court, and although not an issue raised by the parties, this Court notes or would add that Simbo's attorney signed the responses and the failure of Mark Sims, answering on behalf of Simbo, to verify his responses, does not require this Court to deem them admitted or to not consider them as evidence. *Lecso v. Heaton*, (8th Dist. No. 94121), 2010-Ohio-3880, 2010 Ohio App. LEXIS 3277, ¶29, citing *First Fed. Bank of Ohio v Angelini*, 160 Ohio App.3d 821, 2005 Ohio 2242, 828 N.E.2d 1064.

[3] The Lease was attached as Exhibit A to Defendant's Motion, and as Exhibit A to Plaintiff's Motion. The Lease was also attached as Exhibit 1 to the transcript of the deposition of Bernardo Moreno.

in writing and shall be deemed to have been given when delivered personally to a general partner, corporate officer or managing agent of such other party, *or* three (3) days after being mailed by certified or registered mail, postage prepaid, return receipt requested, and addressed to such other party at the address set forth herein or to such other address or representative as may be designated from time to time by such other party hereto by notice given in the manner provided in this Section.

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37. **MISCELLANEOUS PROVISIONS**. *** Headings are for convenience only and are not a part of this Lease. *** In interpreting this Lease, the presumption that contracts are to be construed against the drafter shall not be applicable. ***

(Emphasis added by italics.)

M8 and Simbo each argue that the language of the "Option to Renew" provision of the Lease is clear and unambiguous but offer different interpretations of the language. According to M8, this language does not mean that the Lease automatically renewed for another six months absent notice of non-renewal and therefore, the Lease expired on June 19, 2014 and Simbo is not entitled to an additional six months of rent beyond that expiration date. Per M8, since the language cannot be interpreted to require automatic renewal absent notice in accordance with paragraph 33 of the Lease, there is no need to interpret that provision or apply the facts and law thereto.

According to Simbo, the language must be interpreted to mean that the Lease automatically renewed for another six months absent notice of non-renewal and since, per Simbo, M8 did not provide notice in accordance with the requirements of paragraph 33 of the Lease, it renewed for another six months, making M8 liable to it for an additional six months of rent.

Alternatively, both M8 and Simbo argue that if this Court finds that the "Option to Renew" language is ambiguous, then the Court may consider "extrinsic evidence" to determine its meaning. Per M8, the "extrinsic evidence" submitted demonstrates that it is entitled to judgment in its favor on Count I of Plaintiff's Complaint. Per Simbo, the "extrinsic evidence" demonstrates that there are genuine issues of material fact precluding summary judgment in M8's favor, and requiring a trial by jury on Count I.

M8 also asserts that if this Court interprets the Lease to require notice of non-renewal in order to avoid automatic renewal, then M8 did provide the notice required under paragraph 33 of the Lease, when Bernardo Moreno of M8 used written text messaging to notify Simbo of its intent not to renew.

As to Count IV of Simbo's Complaint, M8 maintains that it is entitled to judgment as a matter of law because "[i]n response to discovery requests, ... Simbo has produced no evidence to support its claim for breach of 'other pertinent provisions' of the lease."[4] Specifically, M8 attached as Exhibit E to Defendant's Motion, a copy of "Responses On Behalf Of Simbo Properties, Inc. To Defendant's Discovery Requests", where, in response to Interrogatory 9 asking Simbo to "[s]pecify which 'other pertinent provisions' of the Lease Agreement you contend in Paragraph 26 of the Complaint that M8 breached and explain the factual basis for your contention," Simbo answered "Discovery is continuing in this regard."[5] With Defendant's Motion, M8 attached as Exhibit F, the Affidavit of Mr. Moreno wherein, at paragraph 7, he averred that M8 is "not aware of any other potential claims for breach."[6] In Plaintiff's Brief,

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[4] Defendant's Motion, at pages 1-2.
[5] Defendant's Motion, Exhibit E, at p. 5.
[6] Defendant's Motion, Exhibit F, at p. 2.

Simbo does not even mention much less oppose M8's argument regarding Count IV. Indeed, Simbo did not submit or point to any evidence to support its claim set forth in Count IV or counter the Affidavit testimony of Mr. Moreno. Accordingly, and applying the summary judgment standard set forth below, summary judgment in favor of M8 and against Simbo on Count IV of Plaintiff's Complaint is **GRANTED**.

As to Count III of its Complaint, and as M8 points out, "Simbo did not brief its argument on Count III," but "merely attached unauthenticated photos to its motion and concluded, without factual support, that 'M8 is liable for the damage to the premises that was left when M8 prematurely vacated.' Simbo's Motion at 5-6, 14; Exhibit D to Simbo's Motion."[7] Based upon the summary judgment standard set forth below, this Court agrees with M8's assertion that "[t]his is not sufficient to meet Simbo's burden."[8] Indeed, aside from Simbo's sole assertion in Plaintiff's Motion that M8 is liable for the damage to the premises and the unauthenticated photographs it attached as Exhibit D to Plaintiff's Motion[9], there is absolutely

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[7] Defendant's Brief, at page 7.

[8] *Id.* In its Answer to Interrogatory No. 12 asking it to "[d]escribe the 'property damage and/or damage to the equipment' you contend M8 caused to the property," Simbo replied "[t]he flag pole." Responses On Behalf Of Simbo Properties, Inc. To Defendant's Discovery Requests, at page 6, attached as Exhibit E to Defendant's Motion. In paragraph 6 of the Affidavit of Bernardo Moreno, attached as Exhibit F to Defendant's Motion, M8 acknowledged its awareness of damage to the flag pole and averred that an offer to pay for the value of the flag pole was made to Simbo, but Simbo refused M8's offer.

[9] "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). "A photograph is admissible in evidence if it is shown to be an accurate representation of what or whom it purports to represent." *Constant v. Torres* (8th Dist. No. 97543), 2012-Ohio-2926, ¶12, citing *State v. Hannah*, 54 Ohio St.2d 84, 88, 374 N.E.2d 1359 (1978), citing *Cincinnati, H. & D. Ry. Co. v. De Onzo*, 87 Ohio St. 109, 100 N.E. 320 (1912). "It is unnecessary to show who took the photograph or when it was taken, **provided that there is testimony that the photograph is a fair and accurate representation of what it represents.**" *Constant v. Torres, supra*, citing *State Farm Mut. Auto. Ins. Co. v. Anders*, 10th Dist. No. 11AP-511, 2012-Ohio-824, 197 Ohio App.3d 22, 965 N.E.2d 1056, citing *State v. Farrah*, 10th Dist. No. 01AP-968, 2002 WL 576110 (Apr. 18, 2002). "For photographs, a witness with personal knowledge of the subject of the photographs may authenticate them by testifying that the photographs fairly and accurately depict the subject at the time they were taken." *State v. Roseberry* (8th Dist. No. 96166), 197 Ohio App.3d 256, 268, 967 N.E.2d 233, 243, 2011-Ohio-5921, ¶19, citing *State v. Hannah* (1978), 54 Ohio St.2d 84, 88, 374 N.E.2d 1359. In the instant matter, Simbo did not offer any evidence

no indication that Simbo is actually seeking summary judgment in its favor and against M8 on Count III. Accordingly, the claim for property damage to the premises contained in Count III of Plaintiff's Complaint will proceed to trial..

In Plaintiff's Motion, Simbo seeks summary judgment on M8's counterclaim for constructive eviction, which was plead by M8 in the alternative, specifically, that if the Lease automatically renewed, then Simbo constructively evicted M8. Therefore, after setting forth the summary judgment standard, first this Court will address the central question raised by the parties' motions, i.e. the meaning or interpretation of the "Option to Renew" provision of the Lease.

<u>**Summary Judgment Standard**</u>

"Summary judgment is appropriate where it appears that (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Lisboa v. Lisboa*, (8th Dist. No. 90105), 2008-Ohio-3129, 2008 Ohio App. LEXIS 2653, ¶12, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C). "The burden is on the movant to show that no genuine issue of material fact exists. *Id.* Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to

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or testimony by way of affidavit or otherwise, of a person with knowledge, that the photographs it offered as Exhibit D truly and accurately depict damage to the premises caused by M8.

support its claims." *Lisboa, supra*, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264; Civ.R. 56(C). "Unless the nonmovant then sets forth specific facts showing there is a genuine issue of material fact for trial, summary judgment will be granted to the movant." *Lisboa, id.*

Accordingly, "legal issues, such as the plain language of a contract, are properly addressed by way of summary judgment practice." *Kenney v. Chesapeake Appalachia, L.L.C.* (7th Dist. No. 14 CO 24), 2015-Ohio-1278, 31 N.E.3d 136, 2015 Ohio App. LEXIS 1194, ¶13, citing *Peters v. Tipton*, 7th Dist. No. 07HA3, 2008-Ohio-1524, ¶9-10. "When interpreting a contract, the court must give effect to the intent of the parties to the agreement which is presumed to be mirrored in the language used therein. *Kenney, supra* at ¶14, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 ¶11. "Words and phrases are given their common and ordinary meanings unless another definition is clearly evident in the contract itself or there would be manifest absurdity." *Kenney, supra*, citing *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638, 1992 Ohio 28, 597 N.E.2d 499 (1992). "'As a matter of law, a contract is unambiguous if it can be given a definite legal meaning.'" *Kenney, supra*, citing *Westfield*, 100 Ohio St.3d 216 at ¶11. "A contract is ambiguous if it is susceptible to more than one reasonable interpretation." *Williams v. Williams* (July 12, 2001), Cuyahoga App. No. 78193, 2001 Ohio App. LEXIS 3157, at *6, citing *Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1990), 52 Ohio St.3d 174, 177, 556 N.E.2d 1186. "If the court cannot decipher the plain language of the contract, then the fact-finder can consider extrinsic evidence to resolve the ambiguity and ascertain the parties' intent." *Kenney, supra*, citing *Westfield, supra*, at ¶ 11-13.

"Where the terms of an agreement are ambiguous, the court may consider extrinsic evidence to interpret or construe terms or to supply an omitted term." *Lisboa, supra*, at ¶15, citing *Williams v. Williams, supra*. "The determination of whether a contract is ambiguous and therefore requires extrinsic evidence is a matter of law. Nonetheless, where the court determines that a term is ambiguous or indefinite and conflicting evidence is offered as to the intended meaning, the question of that meaning is one of fact." *Lisboa, supra*, at ¶15, citing *Amstutz v. Prudential Ins. Co.* (1940), 136 Ohio St. 404, 26 N.E.2d 454; *Ohio Historical Society v. General Maintenance & Engineering Co.* (1989), 65 Ohio App.3d 139, 146, 583 N.E.2d 340.

Applying these principles herein, if the Court finds that the language of paragraph 3 is clear and unambiguous so as to conclude either that M8 only had an option to renew and no obligation to renew via notice to Simbo, or that the Lease automatically renewed absent notice to Simbo, then this Court cannot and will not consider the extrinsic evidence offered by M8 and Simbo to support their respective interpretations of paragraph 3 of the Lease and the parties' understanding thereof.

The extrinsic evidence offered by M8 consists of: a December 10, 2013 e-mail correspondence to Mark Sims of Simbo, attached as Exhibit G to Defendant's Motion, demonstrating that Simbo retained a real estate broker to market the premises and an architectural firm to help plan for "prospective new tenants"; a copy of Simbo's December 16, 2013 proposal to Tesla to lease the premises, attached as Exhibit C to Defendant's Motion; a copy of a 10-year lease entered into by and between Simbo, beginning on July 14, 2014, attached as Exhibit D to Defendant's Motion; and a copy of an e-mail dated December 12, 2013

indicating that Tesla wanted to "move forward" and "need[ed] proposal", attached as Exhibit B to Defendant's Reply.[10]

The extrinsic evidence offered by Simbo consists of: a December 4, 2012 e-mail discussing the proposed lease, to include comments regarding the proposed six-month renewal period, attached as Exhibit B to Plaintiff's Motion; the deposition testimony of Bernardo Moreno, specifically his testimony that he provided notice to Simbo, by text and telephone calls, informing Simbo that M8 would vacate the premises after the initial term ended;[11] and the language of M8's original Counterclaim, specifically paragraph 5, wherein M8 cited to paragraphs 3 and 33 of the Lease Agreement for its assertion that "[p]ursuant to the terms of the lease, the lease agreement would automatically renew unless M8 provided Plaintiff with written notice to terminate the lease agreement."[12]

The general rule under Ohio law, as reiterated in *Westfield, supra*, at ¶13, that any ambiguities are to be strictly construed against the drafter and in favor of the non-drafting

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[10] In Plaintiff's Surreply, Simbo objected to M8's attachment of Exhibit B to its Reply, because it constituted a piece of evidentiary materials not included with Defendant's Motion, and M8 did not seek leave of court or an agreement from Simbo to include it. However, the Court granted Simbo leave to file its Surreply wherein Simbo did address Exhibit B.

[11] Deposition of Bernardo Moreno, attached as Exhibit C to Plaintiff's Motion, at 20:18-21:20.

[12] On 10/20/2016 Defendant filed a Motion For Leave To File Amended Counterclaim *Instanter*, to delete the language of paragraph 5 of its original Counterclaim, which was opposed by Plaintiff, but granted by the Court. M8 argues that the original counterclaim, to specifically include paragraph 5, is "null and void" and "is not proof of anything." Defendant's Reply, at p. 4. In support thereof, M8 cites to *Dynes Corp. v. Seikel, Koly & Co.*, 8th Dist. Nos. 66171, 66776, 100 Ohio App.3d. 620, 632. However, the weight of authority, including authority from the Eighth District Court of Appeals, is that admissions contained in an original pleading which is subsequently amended may be offered in evidence, even after a party has amended his original pleading with leave of the court, and even though the original pleading serves no other function in the case. *Hersch v. E.W. Scripps Co.* (8th Dist. No. 43032), 3 Ohio App.3d 367, 375, 445 N.E.2d 670, 679, 1981 Ohio App. LEXIS 10075, citing *Pennsylvania RR. Co. v. Girard* (C.A. 6, 1954), 210 F.2d 437, 440 [54 O.O. 243]; *Duncan v. Charter One Bank* (4th Dist. No. 02CA2855), 2003-Ohio-1907, 2003 Ohio App. LEXIS 1822, ¶16; *Sean Gregor & Assocs. Co., L.P.A. v. Ian N, Friedman Assocs. LLC* (8th Dist. No. 91181), 2008-Ohio-5120, 2008 Ohio App. LEXIS 4319, at ¶16; *Williams v. Williams*, (12th Dist. No. CA2012-08-074), 2013-Ohio-3318, 996 N.E.2d 533, 2013 Ohio App. LEXIS 3388, at ¶¶15-16. Indeed, once the court accepts an amended pleading, the party's original admission to a material fact is no longer conclusive evidence of that fact, but instead, the competing admissions give rise to a genuine issue of fact. *Duncan, supra*, at ¶16, citing *Hersch, supra*, at 375, and *Badalamenti v. Kirkland* (Nov. 29, 1991), Lake App. No. 90-L-15-151, 1991 Ohio App. LEXIS 5709.

party is inapplicable herein. Moreover, under paragraph 37 of the Lease, the Heading of paragraph 3, "Option To Renew" is not part of the Lease and therefore, will not be considered when construing the language set forth in paragraph 3.

M8 argues that the first sentence of paragraph 3 of the Lease, in using the words "may renew", gave M8 the option to renew, but not the obligation to renew. It also argues that the second sentence of paragraph 3 of the Lease, by its terms, does not provide that the Lease will automatically renew for a six-month term if M8 does not provide written notice of its intent not to renew. And, M8 argues that even when read together, the two sentences of paragraph 3 do not provide that the Lease will automatically renew for a six-month term in the absence of written notice of non-renewal, do not impose any obligation on M8 to give notice of non-renewal, and "do[] nothing more than give M8 the **option** to renew the Lease Agreement".[13]

Simbo argues that "common sense" dictates that paragraph 3 must be construed to mean that "there is a repercussion for tenant's failure to give notice if it <u>does not want</u> to renew – the lease automatically renews."[14] Simbo also asserts that contrary to M8's characterization of its argument, it "has never stated that the lease calls for an obligation to renew," but the Lease does "oblige M8 to provide *notice* of its intent to renew," and "the language of the lease states that M8 must exercise th[e] option [to renew admittedly granted under the Lease,] by means of providing notice if it did not want to renew."[15] Simbo states that "[p]roviding written notice of an intention to vacate after the original term is common in lease

[13] Defendant's Motion, at pages 5-6; Defendant's Brief, at p. 2.
[14] Plaintiff's Motion, at p. 9.
[15] Plaintiff's Reply, at pages 2-3.

agreements such as this" but does not submit any evidence in support thereof, albeit what would also constitute "extrinsic evidence".[16]

In the body of paragraph 3, the terms renew or renewal are used five (5) times, but the term "extension" is also used. These two terms have been construed as having two different meanings, i.e., whereas an option to renew presupposes a new contract, an extension means a continuation of the same contract and terms thereof.[17] The word "may" is defined in *Black's Law Dictionary, 7th Ed. (1999)*, as "is permitted to", and in "the primary legal sense," it is usually used in the "permissive" or "discretionary" sense.[18] Therefore, the language of the first sentence of paragraph 3 permits or provides M8 with the discretion to "renew" the Lease, or enter into a new contract, for two consecutive "renewal terms" with each "renewal term" being for a period of one (6) month "extension" or continuation of the same contract and terms of the Lease. The use of both the terms renew/renewal and extension creates an ambiguity.

In addition, when read together, the two sentences provide that M8 "may renew" [or enter into a new contract]...for a period of one (6) month extension [continuation of the Lease and its terms] ... [u]nless [M8] gives [Simbo] written notice that [M8] does not want to renew this Lease [or enter into a new contract] at least six (6) months before the commencement of

[16] *Id.*, at p. 3.

[17] According to the Ohio Supreme Court, a contract containing an option to "extend" for a given term is distinct from a contract containing an option to "renew" for a given term. *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 457, 166 N.E.2d 365 (1960). "A contract containing an option to extend an agreement constitutes a present grant which, if the option is exercised, operates to extend the term of the original agreement." *Kenney, supra*, at ¶20, citing *Ferguson*, 170 Ohio St. at 457-458. "At that time, the contract 'becomes one for both the original and the extended term.'" *Id.* "On the other hand, a contract containing an option to renew grants the right to execute a new contract upon exercise of the option; the present grant is only for the original term after which the parties must execute a new contract." *Id.* "Therefore, an option to extend for an additional term results in the original contract applying, except with regards to the specific features mentioned in the option. By definition, an extension operates to extend the original agreement, which remains as the governing instrument. *Kenney, supra*, at ¶21.

[18] By contrast, *Black's Law Dictionary, id.* defines the term "shall" to mean "has a duty to; more broadly, is required to."

the subsequent renewal term [new contract term]." The inclusion of the second sentence – which does not include the word "automatic" or any similar word and therefore, cannot be construed as requiring "automatic" renewal absent notice - demonstrates that although M8 was given the option or opportunity to renew or extend the Lease, the parties contemplated some kind of written notice of M8's intention regarding same. To not so conclude would make the second sentence superfluous.

Accordingly, the Court finds that paragraph 3 cannot be given a definite legal meaning or is susceptible to more than one reasonable interpretation, and therefore, it is ambiguous. Accordingly, extrinsic evidence can be considered to determine the intended meaning of the parties to the Lease.[19] However, under the case law cited above, the conflicting extrinsic evidence submitted by the parties as delineated above, creates genuine issues of material fact that must be submitted to, considered and decided by the fact-finder, i.e, the jury.[20] Therefore, the parties' respective motions for summary judgment on Count I of Plaintiff's Complaint are **DENIED**.

Indeed, although Mr. Moreno testified in his deposition that he notified Simbo via text and telephone that he would not be renewing the Lease but would be vacating the premises, Mark Sims of Simbo denied receiving such notice.[21] Under *Meadowbrook Dev. Corp. v. Roberts* (8th Dist. No. 79747), 2001-Ohio-4176, 2001 Ohio App. LEXIS 5870, even if a jury, after considering the conflicting extrinsic evidence, interprets paragraph 3 to require written notice of M8's decision not to renew or extend the Lease six months before the expiration of the

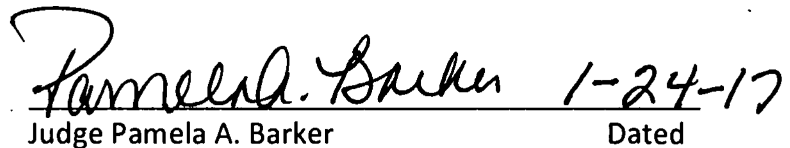
[19] *Lisboa, supra*, at ¶15; *Kenney*, supra, citing *Westfield, supra*, at ¶11-13
[20] *Id.*
[21] Deposition of Bernardo Moreno, 20:18-21:20. Responses On Behalf Of Simbo Properties, Inc. To Defendant's Discovery Requests, Response to Request for Admission No. 3, at p. 3, attached as Exhibit E to Defendant's Motion.

Lease term, it must also determine the following: whether or not M8 provided written notice; and if not, whether or not Simbo had actual knowledge of M8's intent to vacate the premises at the expiration of the 18-month term of the Lease, so as to substantially comply with the provision.

Finally, M8's constructive eviction counterclaim was plead in the alternative to "trigger[] only upon this Court's determination that the lease automatically renewed."[22] This Court has concluded that paragraph 3 is ambiguous and therefore, the jury must evaluate the conflicting extrinsic evidence to determine the meaning of paragraph 3, to include any requirement that M8 provide notice to Simbo of its intent to vacate or not renew or extend, and M8's substantial compliance or non-compliance therewith. Since the issue of "automatic renewal" will be decided by the jury, so, too, will the claim of constructive eviction. Indeed, the evidence submitted by Defendant and Plaintiff create genuine issues of material fact precluding summary judgment in Simbo's favor and against M8 on M8's claim for constructive eviction.

Summary judgment is rendered in favor of M8 and against Simbo on Count IV of Plaintiff's Complaint. The case will proceed to trial on Counts I, II and III of Plaintiff's Complaint and on Defendant's counterclaim for constructive eviction.

IT IS SO ORDERED.



Judge Pamela A. Barker Dated

[22] Defendant's Brief, at p. 8.