

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

SUNSHINE SHOPPING CENTER, INC.,)	
and SUNSHINE SUPERMARKET, INC.,)	
)	
Plaintiffs,)	
)	CIV. NO. 1998-0096
v.)	
)	
KMART CORPORATION,)	
)	
Defendant.)	
_____)	
SUNSHINE SHOPPING CENTER, INC.,)	
)	
Plaintiff,)	
)	CIV. NO. 1999-0099
v.)	
)	
KMART CORPORATION,)	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION

Finch, C.J.

In February 2000, this Court empaneled a jury to hear the damage claim asserted by Plaintiff Sunshine Supermarket, Inc. (the “Supermarket”) against Defendant Kmart Corporation (“Kmart”). The jury returned a verdict in favor of the Supermarket on March 10, 2000 in the amount of \$325,000. However, there are several remaining claims for the Court to resolve. First, Plaintiff Sunshine Shopping Center, Inc. (the “Shopping Center”) seeks, *inter alia*, disgorgement of Kmart’s profits for violating the

Lease pursuant to Count II of the Amended Complaint in Civil No. 1999-0099, which the parties agreed was an equitable claim for the Court to decide and not the jury. Second, the Shopping Center seeks eviction of Kmart from its leasehold premises, which the parties also agreed was a matter for the Court rather than for the jury to decide.

The Court, having considered the testimony of witnesses, the exhibits and depositions offered into evidence at trial, and the arguments of counsel, now enters this memorandum opinion as its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

I. Findings of Fact

1. On December 23, 1991 the parties executed a lease (the "Lease").
2. On January 27, 2000, this Court held that Kmart had breached its obligations under Paragraph 22 of the Lease by selling items in violation of the Lease.
3. Paragraph 22 of the Lease provides, in relevant part:

The premises hereby demised may be used for any lawful retail purpose
Notwithstanding the foregoing, Tenant agrees with Landlord that so long as Sunshine Super Markets, Inc. d/b/a Sunshine Supermarkets its affiliates or successors is operating a supermarket or grocery store on the property described in Exhibit "A" Parcel B, Tenant agrees that it will not use the demised premises for the operation of a food supermarket or food department or for the sale of off-premises consumption of groceries, meat, produce, dairy products, baker products or any of these. The foregoing shall not, however, prohibit: (i) the sale by a restaurant operation, lunch counter, deli or fountain of prepared ready to eat food items, either for consumption on or off the premises (ii) the sale by Tenant, its successors and assigns, of candy, cookies and other miscellaneous foods in areas totaling not more than Ten Thousand (10,000) square feet of sales area, exclusive of aisle space. . . .

Lease at 15.

4. Under Paragraph 25 of the Lease, the Shopping Center's remedies against Kmart are

limited to eviction, damages and injunction, which remedies “shall be exclusive of any other remedies.”

Lease at 16. Specifically, Paragraph 25 states:

If Tenant shall be in default under any other provision of this lease and shall remain so for a period of thirty (30) days after notice to Tenant of such default, then Landlord may, by giving notice to Tenant at any time thereafter during the continuance of such default, either (a) terminate this lease, or (b) re-enter the demised premises by summary proceedings or otherwise, expel Tenant and remove all property therefrom, relet said premises at the best possible rent readily obtainable (making reasonable efforts therefor), and receive the rent therefrom; provided, however, Tenant shall remain liable for the equivalent of the amount of all rent reserved herein less the avails of reletting, if any, after deducting therefrom the reasonable cost of obtaining possession of said premises and of any repairs and alterations necessary to prepare it for reletting. Any and all monthly deficiencies so payable by Tenant shall be paid monthly on the date herein provided for the payment of rent. If any default by Tenant (except nonpayment of rent) cannot reasonably be remedied within thirty (30) days after notice of default, then Tenant shall have such additional time as shall be reasonably necessary to remedy such default before this lease can be terminated or other remedy enforced by Landlord. Except for the legal remedy of damages (provided Landlord shall, in all instances, be required to mitigate damages) and the equitable remedy of an injunction, the remedies of Landlord herein shall be exclusive of any other remedies.

Lease at 16.

5. All parties agree that the Lease is valid and enforceable. Indeed, the Shopping Center's claims are based on this Lease.

6. The Shopping Center seeks to disgorge Kmart's profits on the sale of what it claims to be prohibited food items under the Lease between Kmart and the Shopping Center.

7. In Civil No. 1998/96 - F/B, the Shopping Center claimed breach of contract (Count I), fraud (Count VI), and intentional tort (Count VII).¹ See Second Amended Complaint, Civil No. 1998/96 - F/B. The Shopping Center did not seek the remedy of disgorgement or any form of

¹ The remaining counts were brought only by the Supermarket.

restitution.

8. In Civil No. 1999/0099, the Shopping Center claimed eviction (Count I), breach of contract (Count II), fraud (Count II) and intentional tort (Count IV). The breach of contract count sought the remedy of disgorgement. No other counts sought disgorgement.

9. At trial, the Shopping Center presented no claims to the jury. Therefore, the jury only decided issues concerning the Supermarket. The jury returned an award of \$325,000 for the Supermarket only.

10. This Court previously found that Kmart failed to cure its breach of the Lease within the time provided by the Lease. See January 27, 2000 Mem. Op. at 8. The Court, however, in its January 27, 2000 Memorandum Opinion, deferred its ruling on the eviction claim as it could not resolve the proper application of the relevant equitable principles based upon the evidence provided to it. Specifically, in its January 27 Memorandum Opinion, the Court noted that while equity “abhors a forfeiture,” there was a genuine issue of fact in dispute as to whether Kmart was entitled to equity, as one is barred from seeking equity with “unclean hands.” See January 27, 2000 Mem. Op. at 11-13.

11. In this case, the jury found that Kmart’s conduct was tortious and while this Court need not adopt those findings, this Court notes that Kmart’s conduct in this case was misleading at best and bordered on being deceitful.

12. Moreover, while Kmart told the Shopping Center that it would not compete with the Supermarket (see, e.g., Pl.’s Ex. 6), it has obviously viewed the Supermarket as a competitor. Trial Tr. Vol. II at 127-128, 143-146; Vol. VIII at 27. Such conduct is contrary to the spirit of Kmart’s previous correspondence and not akin to that of an innocent wrongdoer.

13. While Kmart has argued that this case is simply a disagreement as to the interpretation of the Lease, Kmart has failed to suggest any reasonable basis for its adherence to the position that the Lease only prohibited Kmart from operating a full supermarket, thus undermining Kmart's credibility that it is simply trying to comply with the Lease when the Lease language contains no support for this interpretation.

14. Evidence introduced at trial confirmed that only Kmart's top corporate officers reviewed the Lease in order to decide what items should be sold at Kmart's store in the Shopping Center. Trial Tr. Vol. II at 124-125, 169, 173; Vol. III at 98-99; Vol. VIII at 27. Indeed, the store managers never even saw the Lease. Trial Tr. Vol. II at 119-120, 150; Vol. III at 102; Vol. VI at 73.

15. One Kmart manager, Craig Carter, testified that he wanted to expand the sale of food items in the store, but that he could not do so because of a "problem" with the lease, although he was unaware of the nature of this problem. Trial Tr. Vol. II at 176-77.

16. Carter further testified that in 1997 certain Kmart officials, including Kmart's then vice-president, Don Keeble, visited the store and decided to expand its sales even though this expansion would be in violation of the lease restrictions. Trial Tr. Vol. II at 177-79. Keeble testified at trial that he did not recall this conversation (Trial Tr. Vol. VIII at 21), but neither he nor anyone else denied that it occurred. Trial Tr. Vol. VIII at 38-39; Vol. VI at 83-84, 94.

17. The Shopping Center also offered a letter (Pls.' Ex. 6) received from Kmart's corporate counsel, Donald Dayne, in 1993 in response to the Shopping Center's first written objection to Kmart's sale of grocery items in which Dayne stated in part:

We specifically agreed not to operate as a food supermarket and sell those items enumerated in the second paragraph of Article 22, however, we were careful to exempt both by description and a limited area those items normally sold in Kmart stores.

Dayne concluded as follows:

I am also confident that those limited food items sold for off-premises consumption will have little or no impact on your clients sales.

At trial, however, Dayne testified that the lease permitted Kmart to sell anything it wanted, including meat, produce or any other food product, so long as it did not sell all of these items at the same time “as a supermarket would” Trial Tr. Vol. IX at 55-56.

18. The lease, however, prohibits *inter alia*, the sale of “groceries, meat, produce, dairy products, baker products *or any of these.*” (emphasis added). Lease at 15. Thus, the interpretation suggested by Dayne is unsupported by the express wording of the Lease.

19. Further, despite this Court’s ruling on January 27, 2000, Kmart acknowledged at trial that it was still selling items which are prohibited by the Lease including cereals, coffee, teas, soda, juices and other groceries which are clearly not candy, cookies or similar items. Trial Tr. Vol. II at 162-163, 165-166; Vol. VI at 182, 205. While Kmart’s executives may claim to have trouble in interpreting the Lease (Trial Tr. Vol. VI at 182, 205; Vol. VIII at 27; Vol. IX at 55-56), its pantry manager certainly had no such problem when directly asked at trial what constituted grocery items. Trial Tr. Vol. II at 168-169; Vol. VI at 183-185, 206. Indeed, the first assistant manager hired by Kmart in charge of this section in 1993, Yolanda Bryan, likewise identified the items presently sold by Kmart as grocery items. Trial Tr. Vol. II at 102, 104.

20. Likewise, Kmart’s experts acknowledged that recognized industry standards classified

cereals, coffee, tea, sodas, juices and related items as groceries for off-premises consumption. Trial Tr. Vol. VIII at 171, 174-177; Vol. VIII at 219-220.

21. Kmart's conduct demonstrates a lack of candor in addressing its leasehold obligations, particularly after clarification by this Court.

II. Conclusions of Law

A. Disgorgement of Profits

1. The allowable remedies in this commercial lease dispute are set forth in the Restatement (Second) of Property. See Introductory Note, Chapter 13, Restatement (Second) of Property ("This chapter considers the landlord's rights that arise as a result of the nonperformance by the tenant of express or implied promises made by him to the landlord.").

2. Sections 13.1 and 13.2 of the Restatement (Second) of Property set forth the remedies available to the Shopping Center, unless of course the parties had agreed otherwise. See e.g., Restatement (Second) of Property § 13.1, cmt. j ("parties can agree that the landlord's remedies will be more or less extensive than the remedies provided in this section")

3. **In the instant case, the Lease is valid and enforceable and clearly defines the parties' respective remedies. Specifically, the Lease limits the Shopping Center's remedies to eviction, the legal remedy of damages and the equitable remedy of injunction, which remedies "shall be exclusive of any other remedies." Lease at 16, ¶ 25.** Thus, disgorgement is not a remedy recognized under the terms of the Lease. This Court, therefore, will not rewrite the parties' agreement to provide for such a remedy. This decision is in accordance with the following law: Restatement (Second) of Property §§13.1 and 13.2 (both sections set forth the landlord's remedies, which are qualified by the following: "**Except to**

the extent the parties to a lease validly agree otherwise”); Beloit Power Sys., Inc. v. Hess Oil Virgin Islands Corp., 757 F.2d 1427, 1428-31 (3d Cir. 1985) (enforcing the parties’ agreement that limited the parties’ liability); Golden v. Mobil Oil Corp., 882 F.2d 490, 494 (11th Cir. 1989) (noting that “Florida courts consistently have upheld the right to limit the remedies available in the event of a breach of a commercial lease agreement”); Farrace v. Massachusetts Mut. Life Ins., 1998 U.S. App. LEXIS 20141, *7-8 (9th Cir. 1998) (dismissing a damage claim because the lease limited the remedy for any breach “to specific performance, declaratory judgment, or injunctive relief, and specifically waives any right to monetary damages”); but cf. Dewerd v. Bushfield, 993 F. Supp. 365, 368 (D.V.I. 1998) (where there is no evidence that parties intended to limit the remedies, the fact that no other document provided for additional remedies was insignificant).

5. In sum, because **the Lease limits the Shopping Center’s remedies to eviction, the legal remedy of damages and the equitable remedy of injunction**, the Court finds that the Shopping Center is not entitled to disgorgement of profits.

B. Eviction

6. Kmart’s conduct in intentionally violating the Lease with the hope that it would not be penalized for such conduct, does not entitle Kmart to a finding that it has acted in good faith and has “clean hands.” As such, the Court finds that under the doctrine of unclean hands Kmart is not entitled to equitable treatment, as one who seeks equity must do equity. See Bishop v. Bishop, 257 F.2d 495, 500 (3d Cir. 1958) (“It is an ancient and established maxim of equity jurisprudence that he who comes into equity must come with clean hands. If a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing.”)

7. Therefore, the Court finds that the Shopping Center is entitled to an order of eviction against Kmart.

Judgment will be entered accordingly.

ENTER:

DATED: August ____, 2000

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court

by: _____
Deputy Clerk

cc: Joel H. Holt, Esq.
Britain H. Bryant, Esq.
Jon Kingsepp, Esq.

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KMART CORPORATION,)	
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ORDER

Pursuant to this Court’s Findings of Fact and Conclusions of Law, it is hereby

ORDERED that judgment is entered in favor of Defendant Kmart and against Plaintiff

Sunshine Shopping Center as to the claim for disgorgement of profits. It is further

ORDERED that judgment is entered in favor of Plaintiff Sunshine Shopping Center and against

Defendant Kmart as to the eviction claim. Accordingly, it is hereby

ORDERED that Kmart shall vacate the premises it currently leases from Sunshine Shopping Center within sixty (60) days of this Order unless extended by this Court.

ENTER:

DATED: August ____, 2000

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:

Orinn F. Arnold
Clerk of Court

by: _____
Deputy Clerk

cc: Joel Holt, Esq.
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