

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

J & J REAL ESTATE, a Michigan
Co-Partnership,

Plaintiff,

Case No. 13-3564-CK
16-1250-VJ

vs

GALLANT INDUSTRIAL SERVICES, INC.,
A Michigan corporation, and GALLANT
TRANSPORT, INC., a Michigan corporation,

Defendants,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

At a session of said Court held in the City of Jackson,
County of Jackson, State of Michigan, on the 2nd day of
August, 2016

PRESENT: Honorable Joyce Draganchuk
Jackson County Circuit Judge,
by assignment

This matter is before the Court under unusual circumstances. On July 23, 2014, this case was tried before Jackson County Circuit Judge Thomas D. Wilson. At the conclusion of proofs, the Court directed Plaintiff to provide a written closing argument within two weeks. Defendant was to file a response within one week after that and Plaintiff could file a rebuttal within three days. The Court was then going to schedule a date for a ruling.

According to the register of actions, the next event was not until March 9, 2015, when a status conference was scheduled. There was no further docketed action until

August 25, 2015 when the trial judge recused himself and Plaintiff's counsel withdrew. The case was re-assigned to a new judge, but that judge also recused on October 30, 2015. The case was re-assigned to yet another judge, but upon that judge's recusal, the State Court Administrative Office was asked to re-assign the case.

This case qualifies as a Business Court case and this Court sits as the Ingham County Business Court Judge. The State Court Administrative Office accordingly assigned the case to this Court on December 23, 2015.

At a status conference held February 11, 2016, this Court met with Plaintiff's new counsel and Defendants' counsel. It was agreed that because the bench trial held in July 2014 was video recorded, this Court would bring this case to a conclusion by reviewing the video-recorded trial and issuing findings of fact and conclusions of law.

Things were not that easy. The Court Recorder who recorded the trial promptly provided the video recording. She conscientiously included the software needed to play back the recording. The Ingham County IT Department's intervention was needed to install that software. Upon reviewing the trial, this Court noticed that no exhibits were provided with the Jackson County Court file. The Court also noticed that the Defendants' written closing argument was neither docketed as received by Jackson County nor in the Court file. These missing items were requested and received on June 13 and June 14, respectively.

The Court, now having had the opportunity to view the trial with both video and audio recording, and thus having been able to view the witnesses as they testified, and the Court having reviewed the exhibits admitted and received into evidence and having considered the written closing argument of the parties, makes the following findings of

fact and conclusions of law. Rather than first reciting all of the testimony, the Court will discuss the relevant testimony as needed in the context of the issues raised. The burden of proof is on the Plaintiff to prove its claims by a preponderance of the evidence.

Plaintiff's First Amended Complaint has no identified counts, but alleges breach of a commercial lease. Two leases were attached to the complaint, one being signed by Gallant Industrial Services, Inc. and the other being signed by Gallant Transport, Inc. Both leases are dated October 22, 1990.

The complaint alleges that the parties' performance varied from the written terms of the Lease and that Defendants breached the lease by not paying rent, not maintaining insurance and not paying taxes. In addition, it is alleged that Defendants damaged the building, necessitating repairs and that Defendants left materials behind upon vacating the premises, necessitating storage fees.

Defendants' answer to the complaint denied that there was any modification of the Lease. Defendants denied being in breach of the Lease or owing any money under the Lease and stated that materials left behind (storage racks) were transferred to Plaintiff. There were no affirmative defenses or counter-claim filed.

Plaintiff J & J Real Estate was a partnership between father Sam Gallant and son Jon Gallant.¹ J & J Real Estate functioned only for purposes of owning a commercial warehouse-type building on Wayland Drive in Jackson, Michigan. The building was leased and occupied by two Gallant-family-owned companies, Gallant Transport, Inc. and Gallant Industrial Services, Inc.

¹ The father's true name was Jon A. Gallant Sr. but the family always called him Sam to avoid confusion with his son. Accordingly, the Court will refer to the father as Sam and the son as Jon.

Gallant Transport is a trucking company and Gallant Industrial Services was in the business of coolant management. Gallant Industrial Services has had no direct customers and no activity since 2007 or 2008.

Each company signed a separate identical lease. The first set of leases was made in 1990 for a total monthly rental rate of \$2,700 split between the two companies for \$1,350 each (Plaintiff's Exs. A and C). The next set of leases was made October 1, 2010 provided for the same rental rate as the 1990 leases (Plaintiff's Exs. B and D).

Each company paid its own share of rent until late 2010 or early 2011. At that time, Gallant Industrial Services had no activity for several years and it was becoming burdensome to open its books solely for purposes of writing a rent check. Tom Gallant decided instead to write one check from the Gallant Transport account for the total amount of rent.

The 2010 Leases are identical except with regard to the Lessee. The Leases provide in pertinent part:

ARTICLE 2. RENT: Minimum Rent 2.01 Lessee shall pay Lessor at 3519 Wayland Drive, Jackson, MI 49202, or at such other place as the Lessor shall designate from time to time in writing, as rent for the leased premises, the minimum sum of **\$1,350.00**, payable without prior demand and without any setoff or deduction whatsoever, except as expressly provided herein, in equal monthly installments of **\$1,350.00**, each in advance on the first day of each calendar month commencing on **October 1, 2010**, and continuing thereafter until said minimum rent shall be paid.

ARTICLE 11. TERMINATION OR EXTENSION:

Changes in Terms and Conditions. Section 11.02 If Lessor gives written notice prior to the expiration of any term created under this Lease of its intention to change the terms and conditions of this Lease and Lessee does not within ten (10) days from receipt of such notice notify

Lessor of Lessee's intention to terminate at the end of the current term, Lessee will be deemed to have become Lessee under the terms and conditions mentioned in such notice for the period provided for above, or for whatever period is stated in such notice.

ARTICLE 17. MISCELLANEOUS:

Sole agreement of the Parties. Section 17.05. This Lease constitutes the sole agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the subject matter within it.

Amendment. Section 17.06. No amendment, modification, or alteration of the terms hereof shall be binding unless the same be in writing, dated subsequent to the date hereof, and duly executed by the parties hereto.

In addition to the above provisions, the Leases provide that Plaintiff will pay all taxes and gas, electricity, sewage and water expenses. The Defendants were to pay for telephone and rubbish removal. The insurance obligation was divided between them, with Plaintiff obligated to obtain fire and extended coverage on the leased premises and Defendants to obtain liability insurance and fire and extended coverage on their own property at the leased premises.

Jon Gallant testified that he was a 50% partner with Sam in J & J Real Estate. He had been a 50% owner in Gallant Transport and Gallant Industrial Services, but his shares were transferred to his parents and ultimately ended up being owned by Tom Gallant.² Jon remained as an employee of Gallant Transport until early July of 2010.

In May 2010 he and his father Sam discussed increasing the rent. Sam said he was going to increase the rent to \$3,500 per month with one-half paid by each entity.

² Jon Gallant has maintained that the transfer was fraudulent or invalid and that he remains a 50% owner of the companies. That is all the subject of other litigation, but it seems to be the driving force behind most of Jon Gallant's actions.

Shortly thereafter, Jon Gallant was told by his father Sam that he was not to participate in the operation of Gallant Transport and Gallant Industrial Services any longer. Jon acceded to his father's directive and stopped participating in the operations in July 2010.

In November, 2011, Sam Gallant died. As a result, the Jon A. Gallant Sr. Trust became the co-partner of Jon Gallant in J & J Real Estate. Tom Gallant was appointed Special Trustee for purposes of operation of J & J Real Estate only. Since Tom was also the owner of Gallant Transport and Gallant Industrial Services, he had now become both a landlord and his own tenant.

Jon Gallant never knew that the October 2010 Leases had been made.³ He only learned of the October 2010 Leases during the discovery phase of this case. When Jon picked up a checkbook and bank statements from their CPA, he realized that \$3,500 per month was not being paid. Jon e-mail Tom Gallant and informed him that rent was supposed to be \$3,500 per month. He told Tom to send him a copy of any lease that said something to the contrary, and Tom never sent him anything.

Plaintiff bases its claim for \$3,500 monthly rent on the above testimony from Jon Gallant. The claim is wholly unsupported. The Leases could not be any clearer that rent was \$1,350 per month from Gallant Transport and \$1,350 per month from Gallant Industrial Services, for a total of \$2,700 per month. The Leases also could not be any clearer that any modification had to be in writing and that all prior agreements, including oral agreements, were superseded.

Sam may well have told Jon in May 2010 that he was going to increase the rent, but when the Leases were executed in October 2010, the rent was set at \$2,700 per

³ Hence, the 1990 Leases were attached to the Complaint.

month, which was the same rate as contained in the 1990 Leases. Even if Sam's statement that he was going to increase the rent was an accurate statement of his intent, he could not effectuate that without the agreement of his tenant. The only evidence of any agreements of any kind with the tenant are the 2010 Leases.

John Schultz was the tax preparer for J & J Real Estate for its entire existence. He testified that the following rent was paid resulting in the following arrearages based on a rate of \$2,700 per month:

Year	Rent paid	Amount applied to 2009 arrearage	Arrearage for current year
2009			\$24,300
2010	\$43,200	\$10,800	-0-
2011	\$33,366	-0-	-0-
2012	\$18,200	-0-	\$14,200
2013	\$5,900	-0-	\$26,500

In summary, the application of \$10,800 toward the 2009 arrearage left the 2009 arrearage at \$13,500. Adding in the shortage for 2012 and 2013, results in an amount owing of \$54,200 based on a monthly rental of \$2,700.⁴

There are three additional remaining issues with respect to the amount of rent due. First, Tom Gallant paid \$10,912 into an account he established in the name of the Jon A. Gallant Sr. Trust. There was testimony about this account that would suggest that Tom Gallant paid this amount as rent. Defendants are seeking this amount as a credit toward rent. Defendants did not address this issue in their written closing argument and have therefore advanced no argument as to how money held in an account in the name of the Trust could ever function as a rent credit on the amount

⁴ Plaintiff's request for \$53,900 in rent is based on Plaintiff's misstatement of the arrearage for 2013. Plaintiff states the arrearage as \$26,200 when in fact it would be \$26,500 based on a monthly rental of \$2,700. Defendants have not disputed any of the numbers but have instead adopted the position that there is no rent owing.

owed to Plaintiff. The Court finds that the \$10,912 held in the name of the Trust cannot be considered as a credit against rent.

The second issue with respect to the amount due is stated by Defendants in their written closing as a request for a “credit of \$1,620.00 for the lock-out occurring on September 12, 2013.” Plaintiff has failed to address this issue at all in its written closing.

Plaintiff’s Ex. E is a letter from Gallant Transport and Gallant Industrial Services to J & J Real Estate which provides 30-day notice of lease termination “effective 09/31/2013 [sic].” When Mr. Schultz, the CPA, calculated the rent due, it appears that he calculated rent for the entire month of September of 2013. However, Plaintiff’s Ex. O is a letter from Tom Gallant to J & J Real Estate stating that Defendants were locked out of the premises on September 12, 2013. Tom Gallant likewise testified that Defendants were not finished vacating the premises when the locks were changed and they could no longer gain access. Plaintiff’s Ex. M, an e-mail from Jon Gallant to Tom Gallant, supports that at least as of September 15, 2013, Plaintiff had regained possession of the leased premises. Therefore, Defendants are justified in seeking a credit of \$1,620, based on a pro-rata monthly rate of \$90 per day multiplied by 18 days in September of 2013 when they no longer had possession of the premises.

The third and final issue with respect to the amount of rent due is Defendants’ claim that a \$500 security deposit should be refunded. Tom Gallant testified that no security deposit had been paid in 2010 because there had already been one paid previously. He further testified that the 1990 Leases reference a \$500 security deposit

and he never received that back. Plaintiff does not address this issue in its written closing argument.

There has been no counterclaim for return of the security deposit. For that reason alone, the request could fail. However, even if that issue were not present, the Court simply does not believe that a security deposit was ever paid. Jon Gallant testified that there was no lease when this entire arrangement began in the late 1980's. It was only when Jon Gallant was getting divorced that the 1990 Leases were prepared because his divorce attorney told him that he would need a formal lease. He asked his brother Tom to find a boilerplate lease agreement and the 1990 Leases were signed and dated as if they started in 1990 even though it was years later. At that point, they had Leases, but they just continued doing what they had done historically. Under these circumstances, and considering that these were all family-owned and operated businesses, the Court is just not satisfied that Defendants would have really paid a security deposit over to Plaintiff.

The Court finds that the rent owed is \$54,200 minus a pro rata adjustment for the month of September 2013 in the amount of \$1,620 for a total amount of rent owed by Defendants in the amount of \$52,580.⁵

The First Amended Complaint also made a claim that Defendants breached the Leases by failing to pay taxes and insurance. In addition to the fact that there were no proofs on these issues, the Leases unambiguously place the responsibility for taxes and

⁵ There has been some debate in the briefs as to whether Gallant Transport is wholly responsible for the rent or whether it is owed equally between Gallant Transport and Gallant Industrial Services. Regardless of which entity actually paid the rent, there is a lease obligation for Gallant Transport and there is a lease obligation for Gallant Industrial Services. How those entities may actually divide up the obligation is their decision, but no party has provided any authority for this Court imposing the entire obligation on Gallant Transport in the face of both entities' lease obligations.

insurance on Plaintiff. Plaintiff's written closing argument does not address these issues. The Court considers these claims abandoned.

Oddly enough, Defendants have requested judgment for \$97,192.69 as reimbursement for utilities paid by Gallant Transport. Despite the Lease provision that put the responsibility for utilities on Plaintiff, it does appear that Gallant Transport paid them. Plaintiff's Ex. O accounts for \$97,192.69 in utilities being paid starting in 1999 and continuing into 2013. There is no counterclaim in this case and for that reason alone, Defendants are not entitled to judgment for utilities paid by Gallant Transport. The Court need not address other grounds upon which this claim could be denied even if a counterclaim had been filed.

Plaintiff also claims that Gallant Transport is responsible for damages to the building and requests an additional \$25,655 for repairs. Defendants vacated the premises in September 2013. Jon Gallant testified that he found the building in poor condition. An interior wall had been torn down. Apparently, there had been electrical service to this wall and Jon testified that the electrical had been butchered and fixtures that had been attached to that wall had been taken out.

Jon believed the wall had been taken down sometime after January 2011. However, discussions about the wall started in 2003 or 2004. The idea was to take the wall down so tractor trailers could drive directly into the building through a roll-up door. Jon testified that he opposed the idea because he did not believe a tractor trailer would be able to drive all the way through. The wall was not removed at that time.

Tom Gallant testified that the wall came down in 2010. He gave a very detailed and clear description of how and why the wall was removed. The building had a large

roll-up door facing east that allowed most tractor trailers to get into the building. When Gallant Transport's neighbor put up a fence, it inhibited access to that roll-up door. Tom testified that Jon knew that the exact opposite wall facing west used to have a roll-up door that had been covered over. It was Jon's idea to install a door in the west-facing wall to allow tractor-trailer access. However, a partition wall inside the building had to be taken down in order to accomplish that. The wall was made of 2x4's and was easily dismantled.

The wall where the new door was to go had been previously covered with some panels for aesthetic reasons. Tom Gallant testified that he merely unscrewed three 4x12' panels to allow a contractor to look at the underlying structure. He could have replaced them in minutes, but he testified he was locked out of the building before having the opportunity to do so.

The Court finds Tom Gallant's testimony about the removal of the wall to be credible and consistent with the other evidence in this case. Jon was working for Gallant Transport up until July 2010. Although he worked at home dispatching trucks, he was nevertheless involved in the operation of Gallant Transport and he was always a 50% partner in J & J Real Estate. In that context, it is believable that he would have been part of the decision to take down the wall, if not the decision-maker himself.

There is another factor that weighs heavily into the credibility of Tom Gallant's testimony about the wall, or the lack of credibility of Jon Gallant on this issue. Jon submitted testimony from Kevin Cunningham, President of Cunningham Construction, who testified that the cost to repair the wall would be \$25,655. Plaintiff's Ex. P is the written estimate from Cunningham Construction. This amount that Plaintiff is seeking

seems to the Court to be far above and beyond merely restoring the wall. The estimate includes, for example, installation of a 12' stainless steel countertop that was noted to be "quoted per request." To this Court, the request for \$25,655 appears to be a padding of damages that is not honest and harms the overall credibility of the requesting party.

There are two remaining disputed issues. The first is some shelving that was left on the premises when Defendants vacated. This was cantilever shelving attached to the wall and used for vertical storage. Plaintiff, without any support, requested \$21,000 for six months of storage of the shelves. Jon Gallant testified that the shelves were purchased in 2003 or 2004 for \$1,500. A new tenant took possession of the building on April 15, 2014. The new tenant had dis-assembled about one-third of it and was in the process of deciding whether to take down more.

Jon Gallant notified Tom Gallant by e-mail that the shelving must be removed from the premises or there would be a \$3,500 per month "rental" charge. He received no response. Jon sent invoices to Gallant Transport for \$3,500 per month from the date the premises was vacated until April 15, 2014. No payments were received and Plaintiff is requesting \$21,000 for six months of storage.

Conversely, Defendants claim that the shelving was accepted in lieu of rents by Tom Gallant, as Special Trustee for purposes of operating J & J Real Estate. Plaintiff responds by saying that Jon acted as the managing partner of J & J Real Estate after Sam's death and only Jon had authority to accept the shelving.

In the Court's opinion, neither Tom nor Jon ever accepted the shelving in lieu of rents. Tom Gallant testified that the shelving was "sold or traded to J & J Real Estate in writing" and that \$2,700 times four was assigned as the value. The Court simply finds

no support for these statements. The only “writing” that evidences a trade of the shelving for rent is Plaintiff’s Ex. E in which Defendants provide notice of termination of the Lease and indicate that four months’ rent involve an exchange of goods for rent. Defendants cannot unilaterally declare an exchange of goods for rent. No writing has been presented that evidences Plaintiff’s agreement with an exchange of goods for rent and no support is provided for the \$2,700 figure. The CPA’s opinion was that the shelving had no economic value to J & J Real Estate.

Plaintiff’s “rental charge” is equally unsupported. It would stand to reason that this shelving that was left behind when the Defendants vacated the premises should be considered abandoned. The Leases do not clearly address this situation.⁶ Perhaps a landlord could receive damages for storage or removal of abandoned property, but the facts of this case do not support that. The new tenant is making some use of the shelving and there is no indication that the tenant has requested removal of the shelving. If the new tenant is using it, then there is no basis for charging Defendants for storing it. Furthermore, the sum of \$3,500 is, quite frankly, outrageous and also not supported by anything in the record. Plaintiff would have the cost for storage of shelving actually exceed the rental value of the entire leased premises. That position is untenable.

The last dispute concerns a van used by Jon Gallant. The van was acquired in 2007 and titled to Gallant Industrial Services. Jon Gallant testified that he used it for out-of-town service, but after he was terminated as a Gallant Transport employee, Sam

⁶ Article 8 addresses fixtures, which is what the shelving may be since it is attached to the wall. The parties have not argued the applicability of Article 8, perhaps because it is not written in intelligible English.

and Tom asked him to return the van. He refused to return it. At one point, Sam tried to just give the van to Jon because of the concern that Jon was driving a vehicle titled to Gallant Industrial Service. Jon refused to even take the van as a gift. The reason for his refusal relates to his continued insistence that he is a one-half owner of Gallant Industrial Services. Tom Gallant subsequently transferred the van title to J & J Real Estate.

According to their written closing argument, Defendants are seeking a credit against any rent owed for Jon Gallant's use of the van. Plaintiff's Ex. E is a termination of lease letter from Tom Gallant to J & J Real Estate that indicates a \$2,600 credit against rent for March, April, and May of 2012. Plaintiff's Ex. F consists of photocopies of the rent checks for March through June. These two exhibits together show that Tom Gallant is claiming a monthly \$2,600 credit against rent for March through June as a rental charge for Jon's use of the van.

Although Jon used the van after Sam terminated him, no rental fee was ever charged or attempted to be charged until after Sam died. The record discloses no demand for any rental fee was made until June 30, 2012 when Tom Gallant, as Special Trustee, informed Jon Gallant that he was being charged \$2,600 per month to use the vehicle since March 2012.

Defendants make little in the way of argument about the van in their written closing argument. They fail to cite any law or authority or even reasoning for charging rental for use of the van. Other than the delayed demand for van rental that appears in the exhibits, there was no testimony about the actual basis for charging \$2,600 per month. Moreover, their Answer to First Amended Complaint asserted no such set-off

against rent. A defense not asserted in the responsive pleading is considered waived pursuant to MCR 2.111(F)(2).

The van rental charge appears to the Court to be motivated by revenge rather than supported by facts. There was no van rental charge until March of 2012 and there is no evidence Jon Gallant was informed he was being charged until June 30, 2012. There is no explanation of how the figure for the rental was obtained. For all the above reasons, the Court finds no basis for setting-off any amounts against rent for use of the van.

For all the above reasons, the Court finds that a money judgment should enter in favor of Plaintiff in the amount of \$52,580, representing \$54,200 for unpaid rent at the rate of \$2,700 per month less \$1,620 pro rated for September, 2013, together with any costs or interest to which Plaintiff may be entitled. All remaining claims by Plaintiff or claims of set-off by Defendants are dismissed. Plaintiff shall submit a final judgment within fourteen (14) days of the date of this order.

/s/

Hon. Joyce Draganchuk
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on August 2, 2016.

/s/

Ann Baird
Judicial Assistant