

The Lease provided the tenant an initial term of 15 years plus the option for extensions to a total of 29 years 11 months. Under § 1.01 (d) of the Lease, the term of the lease is defined as follows:

1.01 Certain Defined Terms. As used herein, the term:

(d) "Term" means a period of Fifteen (15) years plus that part of the month mentioned in Section 2.07, commencing on the Commencement Date plus any extension of options duly exercised in accordance with the provisions of Section 2.09 of this Lease; provided however, that nothing herein contained to the contrary notwithstanding, in no event will the entire Term of this Lease, including all options and extensions, exceed twenty-nine (29) years and eleven (11) months.

The term of the Lease did not begin when the Lease was entered into since the Lease was entered into before the building was built. The Lease set forth a "Commencement Date". The "Commencement Date" of the Lease is defined in § 1.01 (e) as follows:

(e) "Commencement Date" means the date on which the Term of this Lease commences and shall be the date on which the Landlord delivers the Premises to Tenant (the "Delivery Date") as defined in Section 2.05 hereof.

Section 2.05 provides as follows:

2.05 (a) The Term of the Lease shall commence on the date ("Commencement Date") on which the Landlord delivers the Premises to Tenant with a certificate of occupancy for the Landlord's work (unless the Landlord is unable to obtain such certificate of occupancy because of Tenant's Work is not complete or because of some deficiency in or code violation relating to Tenant's Work) (the "Delivery Date") provided, however, that the Commencement Date shall be deferred until such time as the Garage including parcel pick-up areas and elevators is completed and open for operation...

Section 8.08 provides as follows:

8.08 Effect of Opening for Business. By opening the Premises for business, Tenant shall be deemed to have (a) accepted the Premises, (b) acknowledged that the Premises are ready and suitable for occupancy hereunder and that whatever certificates of occupancy or other permits are required for operation have been obtained and paid for by Tenant,....and (c) acknowledged that the Commencement Date has occurred....

Section 2.07 of the Lease states the following regarding the term of the lease:

2.07 Term. The Term of the Lease shall be for the number of years set forth at Section 1.01 (d) plus the number of days (if any) from the Delivery Date to the first day of the month immediately after the Commencement Date. The Lease shall expire and terminate without the necessity of any notice by either party at the end of the Term, or the end of any extension thereof as provided for hereunder.

Pursuant to the extension option in the Lease, § 2.09, if Fresh Grocer sought to extend the Lease beyond the initial term, it was required to give Penn notice no later than 180 days before the end of the initial term.

Fresh Grocer opened for business on April 20, 2001. Even though the Fresh Grocer opened for business on April 20, 2001, issues and disputes regarding construction and the Lease occurred which were eventually resolved by a letter agreement and release dated February 28, 2001. Thereafter, other disputes arose between Penn and the Fresh Grocer. The Fresh Grocer sued Penn in the Court of Common Pleas of Philadelphia County in an action captioned *Fresh Grocer v. Trustees of the University of Pennsylvania*, December Term 2005, No. 3772. The parties resolved this action with an Omnibus Lease Amendment dated June 28, 2007 and Settlement Agreement. The Lease Amendment provides for the possibility of additional extension periods under the Lease, adding four extension options totaling 18 years. The renewal provision in the Lease was not discussed in the Amendment.

Section 2.09 of the Lease states the following regarding Fresh Grocer's extension options:

2.09 Extension Options. Provided that Tenant is not in default, Tenant is granted an option to extend this Lease past the initial Term for two (2) consecutive five (5) year terms followed by one (1) four (4) year eleven (11) month term (the "Extension Terms (s)") upon Tenant's giving the Landlord notice thereof no later than one hundred eighty (180) days prior to this end of the initial Term, or each Extension Term, as applicable. If any Extension Term is duly elected, this Lease shall continue in full force and effect until the end of the Extension Term as if it were otherwise considered to be the Term hereof.

On February 29, 2016, Fresh Grocer sent a letter to Penn purporting to be a notice of intent to renew the Lease. On April 5, 2016, Penn notified Fresh Grocer that it rejected Fresh Grocer's attempt to extend the Lease as untimely and that pursuant to § 2.07, the Lease would expire on April 30, 2016. Penn said it would allow for an orderly wind up of business and would permit Fresh Grocer to remain on the premises for three months following the April 30, 2016 through July 31, 2016. Fresh Grocer's departure date was extended by mutual consent to July 31, 2016. After a request for bid process, in which Fresh Grocer participated, Penn selected another supermarket operator for the space and sent a letter to Fresh Grocer to vacate the premises no later than March 31, 2017. Fresh Grocer refused to vacate the premises claiming its notice of intent to extend the Lease was timely.

On December 20, 2016, Fresh Grocer instituted this action against Penn seeking declaratory relief that it timely renewed the Lease. The complaint also alleged claims for equitable estoppel, breach of the implied covenant of good faith and fair dealing and breach of contract. Fresh Grocer alleged that the "Commencement Date" of the Lease did not occur until June 28, 2007 when the dispute between the parties settled and that Penn's awareness that Fresh Grocer invested in its leasehold before the November 2, 2015 renewal date estops the lease from ending according to its terms when no option was exercised. Penn counterclaimed for damages, possession and contractual attorney's fees. On February 1, 2018, Penn moved for summary judgment on all counts of the complaint and on its claim for possession. On May 9, 2018, the court granted in part Penn's motion for summary judgment on Fresh Grocer's direct claims but deferred ruling on Penn's counterclaims. This appeal followed.²

² Fresh Grocer filed an appeal of this court's order dated May 9, 2018 notwithstanding the fact that not all claims were decided. The motion for summary judgment was denied in part. The court deferred ruling on Penn's counterclaim for possession so that Penn's counterclaim could be addressed *in toto*. Fresh Grocer's appeal is premature since the May 9, 2018 order is not a final appealable order.

Lease agreements are governed by contract law and general contract law principles. As such, when the language of a lease is clear and unequivocal, its meaning will be determined by its contents alone in ascertaining the intent of the parties.³ Here, construing the Lease as written, it is clear that the “Commencement Date” was April 20, 2001, the term expired on April 30, 2016 and the effective date of an extension request was required by November 2, 2015.

The center of this dispute was the “Commencement Date” of the Lease. As set forth above, the “Commencement Date” under the Lease was triggered when Fresh Grocer opened for business on April 20, 2001.⁴ Fresh Grocer argued that the initial term of the Lease “commenced” on June 28, 2007, not April 20, 2001, when it entered into a settlement agreement and Omnibus Lease Amendment with Penn, so that Fresh Grocer’s February 29, 2016 renewal notice was not four months late, but rather six years early. This court was not persuaded by this argument since the settlement and Omnibus Lease Amendment did not change the “Commencement Date” as defined in the original Lease, i.e. “Commencement Date” shall be deemed to have occurred when Fresh Grocer opened the Premises for business on April 20, 2001. While § 8.08 of the Lease gave Fresh Grocer the right to defer the “Commencement Date” beyond the certificate of occupancy if certain aspects of the construction of the Premises were not complete, there was no evidence that Fresh Grocer exercised this right. Hence, since Fresh Grocer did not defer the opening, it was deemed to have acknowledged the “Commencement Date” of the Lease as April 20, 2001.

³ *Giant Food Stores, LLC v. THF Silver Spring Dev., L.P.*, 959 A.2d 438, 447–448 (Pa. Super. 2008) (internal citations omitted), *appeal denied*, 972 A.2d 522 (Pa. 2009).

⁴ See Penn’s Motion for Summary Judgment Exhibit “3”- Lease §1.01 (d) and (e), § 2.05, § 8.08.

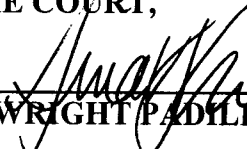
Fresh Grocer’s estoppel argument also failed. Fresh Grocer contends that because it invested in the Premises before the November 2, 2015 renewal deadline, Penn should be estopped from terminating the Lease even though Fresh Grocer failed to timely renew it. However, absent from the record was any evidence that words or actions by Penn induced Fresh Grocer to fail to timely renew the Lease. On the contrary, the record showed that Fresh Grocer believed the “Commencement Date” of the Lease to be April 20, 2001.⁵

The Lease gave Fresh Grocer the option to renew the Lease. The option required Fresh Grocer to notify Penn within 180 days before the expiration of the term.⁶ Since the “Commencement Date” of the Lease was April 20, 2001, the initial 15 year term ended on April 30, 2016. Pursuant to § 2.09, Fresh Grocer was required to notify Penn no later than November 2, 2015, 180 days before the lease termination, of its intent to renew the lease. Fresh Grocer gave its notice of renewal on February 10, 2016. As such, Fresh Grocer’s notice to renew was untimely.

Based on the foregoing, this court’s order dated May 9, 2018 granting Penn’s motion for summary judgment in part should be affirmed.

Date: 1/31/2019

BY THE COURT,



NINA WRIGHT PADILLA, J.

⁵ See, Penn’s Motion for Summary Judgment Exhibit “12” – letter dated October 19, 2001, from Stuart Kurtz, Esquire re tenant’s share of real estate taxes. (Lease did not commence until late April), Exhibit “16”- letter dated January 10, 2004 by Fresh Grocer controller. (Inception and expiration dates of lease: from 4/20/01 to 4/29/16, Exhibit “17”- email dated February 10, 2016 re tracking renewal dates.

⁶ See, Penn’s Motion for Summary Judgment – Exhibit “3” Lease § 2.09.